

No. 12562

United States
Court of Appeals
for the Ninth Circuit.

LIBBY, McNEILL & LIBBY, a Corporation,
Appellant,

vs.


ALASKA INDUSTRIAL BOARD, Composed of
the Territorial Insurance Commissioner, At-
torney General of Alaska and the Territorial
Commissioner of Labor and Peter Lathourakis,
Appellees.

Transcript of Record

Appeal from the District Court for the
Territory of Alaska,
First Division

JUL 24 1950

PAUL P. O'BRIEN,
CLERK



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[Clerk's Note: When deemed likely to be of an important nature, errors or doubtful matters appearing in the original certified record are printed literally in *italic*; and, likewise, cancelled matter appearing in the original certified record is printed and cancelled herein accordingly. When possible, an omission from the text is indicated by printing in *italic* the two words between which the omission seems to occur.]

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ATTORNEYS OF RECORD

R. E. ROBERTSON,

Seward Building,
Juneau, Alaska,

For Appellants.

HENRY RODEN,

Juneau, Alaska,

For Appellee Peter Lathourakis.

J. GERALD WILLIAMS,

Territorial Attorney General,

Juneau, Alaska,

For Appellees—Alaska Industrial
Board et al.

1949

DOCKET ENTRIES

- Nov. 2—Filed from Anchorage, Alaska.
Nov. 4—Alias Summons issued.
Nov. 5—Summons returned unserved 11/5/49 and filed.
Nov. 7—Alias Summons ret'd, served (11/7/49) and filed.
Nov. 9—Stipulation filed.
Nov. 9—Answer of Defendant Lathourakis.

1950

- Jan. 11—Motion to Set for Hearing filed.
Jan. 13—Minute Order—Case set for trial to follow 6075-A or about Wednesday next.
Jan. 21—Brief of Plaintiff filed.
Jan. 18—Minute Order—Case before Court for hearing on appeal.
Jan. 19—Argument cont'd. Files of Ind. Bd. filed. Under advisement.
Feb. 15—Court's Opinion filed.
Mar. 16—Minute Order—Motion for Judgment filed.
Mar. 24—Minute Order—Upon Claimants Motion for Judgment Court signed same. Court set Supersedeas Bond at \$5,000, with which Attorney for Lathourakis concurred.
Mar. 24—Judgment filed and entered.
Apr. 3—Notice of Appeal filed. Copy served on Alaska Indust. Bd.
Apr. 3—Supersedeas on Appeal filed.
Apr. 18—Designation of Contents of Record on Appeal and Statement of Points filed.
May 9—Designation of Contents of Record on Appeal filed.

COMPLAINT AND APPEAL FROM DECISION
AND AWARD OF ALASKA INDUSTRIAL
BOARD UNDER "THE WORKMEN'S
COMPENSATION ACT OF ALASKA."

Comes now the plaintiff and appeals to the District Court for the Territory of Alaska, Third Judicial Division, from that certain decision and award, hereinafter mentioned, of the defendant Alaska Industrial Board and complains and alleges:

I.

That the plaintiff, Libby, McNeill & Libby, is now and at all the times hereinafter mentioned was a corporation organized and existing under the laws of the State of Maine and engaged and authorized to engage in business in the Territory of Alaska; that it has paid its annual corporate license tax last due to the Territory of Alaska; that it has filed with the Auditor of the Territory of Alaska and with the Clerk of the District Court for the Third Judicial Division of Alaska its last annual report required to be filed by it by the laws of Alaska; that it has complied and at all times hereinafter mentioned had complied with the provisions of Section 18, Chapter 9, Extraordinary Session Laws 1946, Sec. 43-3-18, ACLA 1949, as a self-insurer under said Chapter 9 and does now and at all of said times did hold a certificate as a self-insurer under said law from the defendant, Alaska Industrial Board.

II.

That the plaintiff was at all the times hereinafter mentioned engaged in the operation of a salmon

cannery at Libbyville, Alaska, and had in its employ three or more employees.

III.

That the Alaska Industrial Board, hereinafter designated as Board, was created and now exists by virtue of the provisions of Chapter 9, Extraordinary Session Laws 1946, Sections 43-3-1 to 43-3-39, both inclusive, ACLA 1949, known as the Workmen's Compensation Act of Alaska, hereinafter designated as "Compensation Act" and under said Compensation Act its membership is composed of the following three persons, namely: The Territorial Insurance Commissioner, Attorney General of Alaska, and the Territorial Commissioner of Labor; that Frank A. Boyle is now and at all the times hereinafter mentioned was the Territorial Insurance Commissioner; that J. Gerald Williams is now and at all the times hereinafter mentioned was Attorney General of Alaska; that Henry A. Benson is now and at all the times hereinafter mentioned was Territorial Commissioner of Labor and the Chairman and executive officer of the defendant Alaska Industrial Board.

IV.

That the relationship of employer and employee existed between the plaintiff and one Peter Lathourakis on July 16, 1948, who was then employed by it as a fisherman in the operation of said salmon cannery by a term of employment beginning on or about June 25, 1948.

V.

That on or about April 13, 1949, Peter Lathourakis, hereinafter designated as Claimant, made his written application for Adjustment of Claim to the Alaska Industrial Board to obtain "compensation for temporary total disability as a result of injury to arm, chest and esophagus until condition becomes fixed, and then a partial permanent disability determined," which injury he claimed to have been incurred on July 16, 1948, and which compensation he claimed he was entitled to receive under the provisions of said compensation act; that a true copy of said application is attached hereto, marked Exhibit I, and made a part hereof.

VI.

That plaintiff herein, on or about May 26, 1949, filed with said Board its admission of service of and answer to said claim; that a true copy of said Answer is attached hereto, marked Exhibit II, and made a part hereof.

VII.

That on August 30, 1949, a hearing was held before said Board upon said claim, and all the evidence adduced at said hearing, together with the complete file of the Board upon said claim, subject to the objections of the plaintiff herein made at and prior to said hearing, is hereby made a part of this complaint, and the plaintiff herein hereby requests said Board to submit said file to the Court.

VIII.

That hereafter and on September 28, 1949, the defendant Board by all of its said members made and entered its certain decision and award, a true and correct copy whereof, marked Exhibit III is hereunto attached and specifically made a part hereof, but notice and copy whereof was not given to plaintiff herein until October 1, 1949.

IX.

That said decision and award is erroneous in that:

1. The Board has no power or authority to use, as a factor in computing said claimant's average daily wages, the sum of \$1500.00, or any other sum which was not actually earned by the claimant but which he claims was the value of his own work for himself upon his own boat and which he further claims he could have earned from others and which would have been his earnings had he done said work for others instead of for himself.

2. The Board has no power or authority to award temporary disability, either total or partial, in the sum of \$3,833.55, or any other sum, and also to award permanent partial disability in the sum of \$3,600.00, or any other sum.

3. That the Alaska Workmen's Compensation Act does not authorize or empower the award of compensation for both temporary disability, either partial or total, and permanent disability either partial or total, for such injuries as the claimant

claims he sustained and, if compensation for permanent disability, either partial or total, be awarded him, then no compensation can be awarded to him for temporary disability, either partial or total.

4. That the Board has no power or authority to allow an attorney fee of \$1100.00, or any other sum, to applicant and to order, if such is the intention of the award, that such attorney fee be paid by the plaintiff, in addition to the award of compensation of \$7433.55, or in any other sum, to the claimant for any alleged injuries suffered by him.

5. That no competent evidence was adduced of the claimant's having suffered 50% or any permanent disability whatsoever by reason of a personal injury arising out of and in the course of his employment by the plaintiff on July 16, 1948, or at any time, and that said award is not based upon any competent evidence.

6. That the Board in its said award entirely ignored the uncontradicted evidence that claimant engaged in his customary occupation of fishing and made and received his customary earnings in that occupation during the salmon fishing season of 1949.

X.

That the place where plaintiff's said fishing operations were conducted is now and then was in the Third Judicial Division of Alaska and within the jurisdiction of the District Court for the Territory of Alaska, Division Number Three, at Anchorage, Alaska.

XI.

That plaintiff prosecutes this its appeal in good faith and not with the intent to fail or refuse to pay to the clamiant such, if any, sums as may be finally awarded to him; that plaintiff is advised by legal counsel that said award is contrary to the law and to the evidence.

Wherefore, Plaintiff appeals to the District Court for the Territory of Alaska, for the Third Judicial Division and prays that said decision and award of the Alaska Industrial Board may be entirely suspended and set aside, and for such other and further relief as may be meet and equitable in the premises.

Respectfully submitted,

PLUMMER & ARNELL.

EXHIBIT I

Copy

Territory of Alaska

Alaska Industrial Board

Application for Adjustment of Claim
Alaska Workmen's Compensation Act

Note:—Either party to the dispute may apply to the Board for adjustment of any matter in difference. The original application and two copies for the defendant must be mailed to Board at Juneau, Alaska. Due notice will thereafter be given of the time and place of hearing. Either party may be represented in person, by agent or by attorney.

PETER LATHOURAKIS,

Applicant,

vs.

LIBBY, McNEILL & LIBBY,

Defendant.

Applicant's Address: c/o Roy E. Jackson, 1207 American Building, Seattle, Washington.

Defendant's Address: 87 Hamlin Street, Seattle, Washington.

1. Peter Lathourakis, age 60, while employed as fisherman on July 16, 1948, at Libbyville, Alaska, by Libby, McNeill & Libby, who is subject to the Act, sustained injury arising out of and in the course of said employment as follows: Claimant's fishing boat in tow of monkey boat struck barge head-on at about 25 miles per hour, resulting in crushing injury to right arm and severe injury to chest, esophagus and abdomen.

2. Injured left work on July 16, 1948, and disability continued to present time.

3. Last payment of compensation on Oct. 14, 1948; last medical furnished by employer on Oct. 14, 1948. Notice of injury given employer on July 16, 1948.

4. Medical and surgical treatment has been rendered by Libby Hospital, Koggiung; Dr. A. Bernard Gray, Seattle; Marine Hospital, Seattle; and Dr. H. W. Reimer, Seattle.

5. Employee's wages were \$83.10 per day, working 6 days per week plus \$1.00 per day for board. Season earnings 6-25 to 7-24 \$2493.21, plus board of \$30.00.

6. Total compensation paid to date \$1050.80.

7. Injured was married, and had two dependents, as follows: John, age 21, and Helen, age 18, attending school and living at home.

9. A question has arisen with respect to the liability of the employer or insurance carrier, or the amount owed and the reason for filing this application is: To obtain compensation for temporary total disability as a result of injury to arm, chest, and esophagus, until condition becomes fixed and then a permanent partial disability determined.

Wherefore, it is requested that a time and place be fixed for hearing and notice given, and that an order or award be made granting such relief as the party or parties may be entitled to.

Dated at Seattle, Washington, April 13, 1949.

/s/ ROY E. JACKSON,
Attorney for applicant.

/s/ PETER LATHOURAKIS,
Applicant.

EXHIBIT II

Copy

Territory of Alaska
Alaska Industrial Board

PETER LATHOURAKIS,

Applicant.

vs.

LIBBY, McNEILL & LIBBY,

Defendant.

ADMISSION OF SERVICE AND
ANSWER TO APPLICATION

The defendant above named for answer to the application herein respectfully shows:

1. It is admitted that applicant sustained an injury on or about the date set forth in application.
2. It is admitted that both the employer and employee were subject to the Alaska Workmen's Compensation Act at the time of the alleged injury.
3. It is admitted that the relationship of employer and employee existed at the time of injury.
4. It is admitted that at the time of the alleged injury the employee was performing service arising out of and in the course of employment.
5. It is admitted that Notice of Injury was given employer as set forth in application.
6. It is denied that the applicant was temporarily disabled for the period stated in the application.

7. It is denied that the applicant was permanently disabled to the extent shown in application.

8. It is denied that the rate of wages as set forth in the application is correct, but that his daily average earnings while in the employ of defendant were \$21.846 a day which were more than his average daily wages throughout the remainder of the year when not working for the defendant. The defendant will insist that all evidence must be adduced according to legal rules for the admission of evidence and that it is otherwise inadmissible, and will object to all ex parte evidence offered to prove or seek to prove any of the facts upon which the claimant bases his claim and the defendant will insist upon having a hearing before the full membership of the board.

Dated at Juneau, Alaska, May 26, 1949.

LIBBY, McNEILL & LIBBY,
Defendant.

By /s/ R. E. ROBERTSON,
Attorney for Defendant.

EXHIBIT III

Alaska Industrial Board

Juneau, Alaska

Case No. 8-7-36

PETER LATHOURAKIS,

Applicant,

vs.

LIBBY, McNEILL & LIBBY, a Corporation,
Defendant.

BOARD DECISION AND AWARD

(Full Board)

Pursuant to the application of above-named applicant, the matter came on for hearing before the full board. Applicant was present in person and represented by Attorney Henry Roden. Defendant employer, self insured, was represented by Attorney R. E. Robertson. From testimony presented at the hearing and the files and records in the case, the Board considered the case on its merits and finds as follows:

Facts

Applicant, Peter Lathourakis, was employed as a commercial fisherman by defendant at Libbyville, Bristol Bay, Alaska, during the season of 1948 and had been so engaged for various employers in Bristol Bay for some 20 years.

On July 16, 1948, while his boat was being towed

to a scow a collision occurred which resulted in serious injury to Lathourakis, requiring that he be immediately taken to the hospital at Libbyville for emergency treatment and then sent to Koggiung. He was unable to swallow solid foods.

About July 24 applicant was transported to Seattle and placed under care of Bernard Gray, employer's physician, who treated the injured arm. The second day after his treatment by Dr. Gray began, Lathourakis told the Doctor of his difficulty in swallowing and his inability to eat solid foods. X-rays were then taken of the esophagus, and which revealed an organic lesion which had the appearance of carcinoma. Dr. Gray then referred Lathourakis to Dr. Julius Webber who performed an esophagoscopy and found an organic lesion of the walls of the esophagus. A biopsy was made which was diagnosed as "a developmental anomaly with a question of an early adenocarcinoma arriving in the cardiac glands of the esophagus."

Upon the basis on Dr. Webber's diagnosis, Dr. Gray advised Lathourakis that he probably had a cancer which should have surgical treatment and arrangements were made for Lathourakis to enter the Marine Hospital. Dr. Gray advised Lathourakis that the treatment for the cancer would not be paid by the employer.

On September 15, Lathourakis entered the Marine Hospital and his examination and treatment began. After two weeks he was advised that he probably had a cancer and should undergo surgery.

His condition had not materially changed. He refused surgery and was discharged from the Marine Hospital against medical advise.

Upon the advice of Dr. Gray and the solicitation of members of his family he returned to the hospital on October 7th willing to undergo surgery.

He had lost about 40 pounds in weight since his injury and for the 3 days prior to hospitalization had been unable to swallow anything.

On October 10th an exploratory thoracotomy and an exploration of mediastinum was performed. The operation required the collapse of the lung, the removal of the 8th rib and opening up the chest. No cancer was found. To correct the inflamed condition of the esophagus the stomach was put up to the middle third of the esophagus and supported in position by sewing it to the chest wall and the vertebral column. The diaphragm was then sewn to the stomach, the lung re-expanded, and the chest closed. Dr. McGowan, who performed the operation, stated that the lesions found in the esophagus were analagous to stomach ulcers, resulting in a narrowing of the esophagus so as to prevent swallowing.

Following the operation both Dr. Gray and Dr. McGowan revised their earlier diagnosis of early cancer in no way related to trauma to a conclusion that Lathourakis was suffering from a pre-existing condition of a congenital nature wholly unrelated to the injury suffered in the collision at Bristol Bay on July 16th. However, medical

opinion expressed by other physicians who examined the clinical records and history lead to the inescapable conclusion that the derangement of the esophagus is directly traceable to the injury of July 16, since Lathourakis prior to his injury had been an exceptionally vigorous man with no indication of any kind that he was suffering a congenital anomaly of the esophagus.

Applicant's temporary total disability continued from July 19, 1948, to May 20, 1949.

His earnings during the year 1947 totalled approximately \$5,300.00 and in addition thereto Lathourakis performed \$1500 work on his own boat during time he might have had employment for wages in an equal amount, for a total annual wage earning capacity of \$6,800 during the year 1947, making a daily wage earning capacity of \$18.73.

Lathourakis was employed during the 1949 season by Peninsula Packing Company as a fisherman in Bristol Bay in disregard of his disability because of his outstanding productive record in Bristol Bay, having for years been top producer among all Bristol Bay fishermen. His superintendent stated that he was no longer able to perform the duties of a fisherman and had been hired because of his knowledge of fishing and familiarity with the Bay.

His permanent disability consists of a residual weakness in his right hand, lack of stamina and endurance, shortness of breath, and difficulty in performing any manual labor due to the restricted

diet he is compelled to follow. The degree of permanent partial disability may reasonably be computed at 50% of total permanent disability related to loss of earning capacity.

Lathourakis is married.

Consideration of Applicable Law

Applicant suffered a temporary total disability and a permanent partial disability by reason of a personal injury by accident arising out of and in the course of his employment by defendant on July 16, 1948.

Such disability being compensable under the Alaska Workmen's Compensation Act.

Award

In view of the foregoing findings of fact and conclusions of law the Board hereby awards applicant, Peter Lathourakis, the sum of \$3,833.55, which represented 315 days compensation at the rate of \$12.17 per day less \$1,050.80 already paid by defendant, employer, plus interest at 8% per annum from date due until paid, plus the further sum of \$3600.00, representing the compensation for permanent partial disability on the basis of 50% of permanent total disability for a married man.

Applicant is awarded reimbursement for all necessary medical expenses incurred by reason of his injury and recovery during the year following the day of injury.

Applicant's attorney's fee is hereby fixed at \$1,100.00.

ALASKA INDUSTRIAL
BOARD,

HENRY A. BENSON,
Chairman.

HENRY A. BENSON,
Commissioner of Labor.

J. GERALD WILLIAMS,
Member.

J. GERALD WILLIAMS,
Attorney General.

FRANK A. BOYLE,
Member.

FRANK A. BOYLE,
Insurance Commissioner.

Dated at Juneau, Alaska, this 28th day of September, 1949.

Duly verified.

[Endorsed]: Filed October 27, 1949.

STIPULATION

Counsel for plaintiff corporation, Mr. R. E. Robertson and Counsel for defendant Alaska Industrial Board, do hereby stipulate that one Peter Lathourakis may be made a party defendant in the above-entitled cause.

Dated at Juneau, Alaska, Nov. 7, 1949.

/s/ R. E. ROBERTSON,
Attorney for Plaintiff
Corporation.

/s/ J. GERALD WILLIAMS,
Attorney for Defendant
Alaska Industrial Board.

ANSWER OF DEFENDANT LATHOURAKIS

The defendant Peter Lathourakis, answering plaintiff's complaint in the above-entitled cause, denies and alleges as follows, to wit:

Denies all the allegations, matters and things contained in paragraph nine of said complaint and the whole thereof except the allegations contained in subsection 4 of said paragraph nine.

/s/ HENRY RODEN,
Attorney for Peter
Lathourakis.

United States of America,
Territory of Alaska—ss.

Henry Roden, being first duly sworn, on oath deposes and says: I am the attorney of Defendant Peter Lathourakis, whose answer to plaintiff's complaint is as aforesaid. I have read said answer, know the contents thereof and that the same is true, as I verily believe. I make this verification on behalf of said defendant Lathourakis who is not now at Juneau, Alaska, the place where same is made.

/s/ HENRY RODEN,

Subscribed and sworn to before me this 7th day of November, 1949.

[Seal] /s/ L. MARIE JENSEN,
Deputy Clerk, U. S. District Court, First Division, Territory of Alaska.

APPELLANT'S OBJECTIONS

4. That it contends that evidence must be adduced in a legal manner, and not ex parte, and is entitled to the right of cross-examination of all of claimant's witnesses.

5. That it demands a hearing before the full board with all members of the board present.

6. That the law does not authorize or permit a hearing to be held upon the extent of alleged

temporary disability and a later hearing upon partial permanent disability.

7. That claimant has, if any, only one claim.

8. The Board has no power or authority to award both temporary disability and permanent partial or total disability and, if any permanent partial or total disability is awarded, then no temporary disability can be awarded.

Respectfully,

R. E. ROBERTSON,
Attorney for Defendant.

Copy received June 27, 1949.

DEPOSITION OF PETER LATHOURAKIS

Those present in the offices of the Alaska Industrial Board were Henry Roden, attorney for applicant, applicant Peter Lathourakis, attorney for defendant R. E. Robertson and Board Members Henry A. Benson, Frank A. Boyle and J. Gerald Williams.

Applicant was sworn in by the Chairman of the Board.

Direct Examination

By Henry Roden:

Q. What is your name?

A. Peter Lathourakis.

Q. Where do you live?

(Deposition of Peter Lathourakis.)

A. 338 W. 77th, Seattle, Washington.

Q. How old a man are you? A. 60 years.

Q. What is your business? A. Fisherman.

Q. How long have you been a fisherman?

A. Since 1922.

Q. In 1948 did you do any fishing?

A. Libby at Bristol Bay.

Q. When did you go up there?

A. June 25.

Q. You were examined by Cannery doctor?

A. Yes, by Dr. Gray.

Q. On the 16th of July what were you doing?

A. I was fishing.

Q. Did anything out of the way happen that day?

A. We were being towed by power boat to scow to deliver the fish when I got hurt.

Q. Tell these gentlemen how the accident occurred.

A. While maneuvering around scow, power boat that was pulling us made a sharp turn and we ran into the barge at about 25 miles an hour.

Q. Whose fault was that?

A. The power boat man.

Q. You hit the barge at 25 miles per hour?

A. Yes, just before that I was in bow from where I jumped down into forecastle and held onto the mast. If I had jumped overboard I'd have had no chance. I put my right arm around mast. Then the topside of barge hit the mast, caught my arm and head on mast. I then dropped down into the forecastle.

(Deposition of Peter Lathourakis.)

Q. What happened then?

A. We hit another barge. After the accident I was all played out and took a little drink of gin which we keep on the boat for cold weather. I took a little drink and right away and right away puked up.

Q. After that you were sick to your stomach?

A. So I suffer from pain, the arm and chest was black and numb.

Q. What happened then?

A. I was taken in to hospital and cleaned up as I was all bloody. I was put to bed and next day I was taken to Koggiung.

Q. Where did you go to there?

A. To hospital and doctor.

Q. Who was doctor?

A. I don't konw, one old man. I stay five days.

Q. What did the doctor do to you?

A. After couple hours the doctor asked me how I feel. My arm was swelled up like a balloon and was all black and blue. Then he grabbed my hand and juggled it. Christ, the killed me. I told the doctor not to do that any more or I'll kick you. They had no x-rays up there.

Q. How long at Koggiung?

A. 5 days, the put cast on.

Q. What time did you get to Seattle.

A. About 23 July.

(Deposition of Peter Lathourakis.)

Q. What happened when you got to Seattle?

A. I got in and stayed home Saturday and Sunday and Monday morning went to see Dr. Gray with piece of paper from Cannery. They took x-ray.

Q. What did they do then?

A. Told me to come every morning at 10 o'clock.

Q. Did you get any better?

A. I told doctor about chest that I couldn't eat any solid food.

Q. How did you eat after July 16?

A. They bring me beef and potatoes. I was not able to eat anything but spuds and soft stuff. I told Dr. Gray nurse about the way I feel.

Q. Did they take any x-ray pictures and what did they find?

A. They took pictures and sent me to Swedish Hospital to take biopsy. To take out piece. They told me wife that I had cancer. After that I went every other day. Dr. Gray told me that having cancer I would have to pay for it myself. They give me two more weeks treatment. Dr. Gray sent me to Marine hospital to take another biopsy.

Q. Did you go to hospital?

A. I stay at Marine hospital for 3 weeks. Dr. Weber was there when biopsy was taken and found negative. It showed no cancer.

Q. Did you ever find that you had cancer?

A. No.

Q. Were you ever operated on for cancer?

A. Yes, at the Marine hospital.

(Deposition of Peter Lathourakis.)

Q. How many doctors said you had cancer?

A. Dr. Gray, Dr. Weber and Marine Hospital.

Q. What did they find after they operated on you? A. Flemadora.

Q. Did they find cancer? A. No.

Q. How long did this operation take?

A. 8 hours. They took off one rib all together.
I not able to feel anything there for 8 or 9 months.

Q. How much did you weigh before accident?

A. 190.

Q. How much now? A. 156.

Q. Can you gain weight? A. No.

Q. Why can't you gain weight?

A. I can't eat much good solid food and I can't sleep well. I can eat hamburgers and fish, however.

Q. Can you eat ordinary foods?

A. No. I can't get them down, they won't go down, something, I throw whole thing up. I have take medicine before meals and have to eat 5 or 6 times a day.

Q. How does it affect your walking?

A. I can only walk two or three blocks on level and only one block on hill.

Q. How is right arm?

A. Numb. It pain when I did little work around boat on doctor's orders.

Q. How about fingers?

A. I have very little grip in right hand now and two fingers are numb.

Q. How was your right hand before?

(Deposition of Peter Lathourakis.)

A. I was strong enough for two men.

Q. How much did you make in 1948?

A. \$2,500.00 from Libby for 15 days the fishing season.

Q. How many days did you put in to make that?

A. About month or month and half.

Q. Did you earn any money before you went fishing in 1948?

A. Working on my boat.

Q. What kind of boat is it?

A. 34 feet, square stern gillnetter.

Q. You fixed up that boat—how long did it take in 1948?

A. 4 months I took it out shipyard and finish.

Q. What was your time worth?

A. The shipyard asked \$25.00 a day for one man for 8 hours' work.

Q. I understand instead of pay \$25 a day to the shipyard for a man, you did the work yourself?

A. Yes.

Q. If you hadn't done this work, you could have worked for someone else?

A. I had offer to mend nets for Norby Supply Co. in Seattle.

Q. How much does Norby Supply Co. pay?

A. Not much, only about \$1.85 per hour.

Q. That took you 4 months. Did you work any before going fishing?

A. Worked for Nick Bez—fix nets—3 weeks pay \$1.87 per hour (\$180.00).

(Deposition of Peter Lathourakis.)

Q. Have you made up a statement showing how much you made in 1948?

A. I have best boat on Puget Sound, the other fishermen make from 3 to 5 thousand.

Q. How much could you make between August and December? A. About \$4,000.00.

Q. How much clear? A. About \$3,000.00.

Q. In 1947 how much did you make?

A. \$5,400.00.

Q. What kind of work can you do now?

A. I don't know. I don't think anyone even a good friend would hire me in the condition I'm in.

Q. Do you think you can do as much work as before?

A. I don't think I can do $\frac{1}{3}$ as much as before. I got no strength—no nothing.

Q. How is your breathing?

A. Not very good.

Q. How many children?

A. Two. One under 18 at time of accident.

Mr. Roden: That's all.

Direct Examination

By Mr. Robertson:

Q. Pete, your fishing partner Coulas asked you how you were immediately after the accident and you told him you were all right.

A. If a fellow is all bunged up, how can he tell what he say?

(Deposition of Peter Lathourakis.)

Q. Reads from record regarding statement of previous question.

A. Mebbby yes, mebbby no, it hard to remember.

Q. Who owned the boat in which you fished and where were you at the time of accident?

A. Libby owned boat. The place was known as Libbyville.

Q. Who owned power boat that was towing you?

A. Red Salmon Canning Co.

Q. The barge or scow was owned by?

A. I don't know—it was fish scow.

Q. Libbys paid you \$2,549.11, didn't they?

A. Yes, that's right.

Q. When did your employment commence under the union contract? A. June 26.

Q. What was expiration date of contract?

A. Probably 10 or 15 August.

Q. Libby paid you \$1,050.80 under A.W.C.A. as result of injury? A. Yes, that's right.

Q. Where was your operation performed?

A. Marine Hospital.

Q. You found at that time that your esophagus had thickened so that you could not eat?

A. Flamatory.

Q. Didn't you have chronic esophagitis?

A. —.

Q. When did you last work on your boat?

A. I don't recall the last day, but I work January, February, March, April.

Q. Where's boat now?

(Deposition of Peter Lathourakis.)

A. Fisherman's dock, Seattle.

Q. Did you do anything to it this year?

A. Yes, a little painting inside and outside.

Q. When was this?

A. Just before I came down here—every other day.

Q. When did you use boat last for fall fishing?

A. November, 1947.

Q. You earned \$187.00 from Nick Bez and \$2,549.00 from Libby?

A. Yes.

Q. In fall of 1947 you earned \$1,500.00.

A. Yes, that is right.

Q. You say that you have been examined by doctor every year. Did they take any x-rays?

A. Yes. No, no x-ray.

Q. When was last time you vomited?

A. About two week ago.

Q. You can't even now eat things like big beef-steak, pork chop or the like?

A. No, not very well.

Q. Have you signed on with anyone to fish this season?

A. No.

Q. (By Mr. Roden): You made out a statement as to what money you could have earned in 1948?

A. Yes, I have.

Q. (By Mr. Roden): You put in about four months of work on your boat in which you made at \$2 per hour that way you made, earned or saved \$1,536.00.

A. Yes.

Q. (By Mr. Roden): Then you got \$180 from Nick Bez.

A. Yes.

(Deposition of Peter Lathourakis.)

Q. (By Mr. Roden): Then you got over \$2,500 from Libby, McNeill & Libby? A. Yes.

Q. (By Mr. Roden): Then you say that from August 20 to November 20 a period of 3 months you could have earned fishing on the Sound \$4,000 which would have cost you about \$1,000 expense.

A. That's right.

Q. (By Mr. Roden): What about fishing for dog livers. How much could you make?

A. About \$1,000.

Q. (By Mr. Roden): When do you fish for dogs? A. In fall after regular season.

Q. (By Mr. Roden): If those figures are true you could have made \$8,216.00 last year.

A. That's right.

Q. (By Mr. Roden): In 1947 how much from Libby? A. Over \$3,000 I think.

Q. (By Mr. Roden): How much before you went to cannery in 1947. How much money did you pay income tax on? A. \$4,500.00

Q. (By Mr. Roden): You earned additional money in 1947 which did not show in income tax because you did not get it until 1948?

A. That right—yes.

Q. (By Mr. Roden): That you got \$892.00 more during that year? A. Yes.

Q. (By Mr. Roden): Your earnings for 1947 was about \$5,300.00? A. Yes.

Q. (By Mr. Roden): Tell these gentlemen how much you earned in 1946.

(Deposition of Peter Lathourakis.)

A. That is hard to say, I don't—to lie about it.

Q. (By Mr. Roden): Did you make more in 1946 than in 1947? A. Yes.

Q. (By Mr. Roden): Has it been difficult to make that money while you were in good health?

A. No, no trouble at all.

Q. You were high boat in 1947? A. Yes.

Q. (My Mr. Roden): Were you high boat in 1946 too? A. Yes.

Q. (By Mr. Roden): Before you had this accident did you have any trouble about eating?

A. No. No.

Q. (By Mr. Roden): In 1948 after the canning season, did you know how much the boys who had a boat like you have made fall fishing?

A. Some made \$3,000, some made \$4,000 and some made \$5,000.

Q. (By Mr. Roden): Would you say that a reasonably good fisherman could make \$3,000 net in that time?

A. Yes. He could easily make that.

Q. (By Mr. Robertson): You got back to Seattle July 24? A. Yes.

Q. (By Mr. Robertson): Now I ask you again Pete, what did you actually earn working for someone else in 1948. The only amount was \$2,549.11 that Libby paid you and \$180.00 that Nick Bez paid you? A. Yes, that right.

Q. (By Mr. Robertson): How much would it cost you to fish for dog livers on which you claim you could make a thousand dollars?

(Deposition of Peter Lathourakis.)

A. About \$50. I burn diesel.

Q. (By Mr. Robertson): You don't fish for dog livers in the fall do you? A. Yes.

Q. (By Mr. Robertson): This \$1,500 shown on the statement, you didn't earn that did you, that is what you say it would have cost you to work on your own boat. That you hired yourself as shipwright wages or carpenter wages?

A. Yes, it would have cost \$1,800 to do same thing at shipyard.

Q. (By Mr. Robertson): I object to this exhibit as being a true statement of wages.

Q. (By Mr. Roden): You could have earned \$1,500 working for someone else couldn't you, in those four months? A. Yes.

Q. (By Mr. Roden): What kind of work could you have done in that time?

A. I could have work as rigger in shipyard.

Q. (By Mr. Roden): What is scale for rigger?

A. I don't exactly know—it's over \$2.00 hour.

Q. (By Mr. Benson): You were in the 1st World War you say? A. Yes.

Q. (By Mr. Benson): Did you have trouble with your stomach then? A. No, sir.

Q. (By Mr. Benson): Did you ever vomit in your life before? A. No, sir.

Q. (By Mr. Benson): You started vomiting as soon as you had the accident in Bristol Bay?

A. That's right.

Q. (By Mr. Benson): You say that you vomited up until 20 days ago.

(Deposition of Peter Lathourakis.)

A. That is right. Yes.

Q. (By Mr. Benson): You feel pretty good now though?

A. Well, I still feel pretty weak.

Q. (By Mr. Benson): You feel weak, but you feel pretty good and you can eat soft foods?

A. Yes, that right.

Q. (By Mr. Benson): Did you start vomiting immediately after the accident?

A. Yes, about one-half hour after the accident.

Q. (By Mr. Benson): You have never been to a doctor except for a physical examination?

A. Yes, that right.

Q. (By Mr. Benson): Are there any more questions to be asked of the witness?

That will be all, Mr. Lathourakis.

DEPOSITION OF FRED SHEILS

By Henry Roden:

Q. What is your name?

A. Fred Sheils.

Q. What is your business?

A. Supt. for Peninsula Packing Co.

Q. Are you acquainted with a man named Peter Lathourakis?

A. Yes, I've known him since 1943.

Q. What business has he been engaged in since you have known him?

A. Fishing.

(Deposition of Fred Sheils.)

Q. Have you ever been around where he fished himself?

A. Yes, at Ekuk Cannery Co., in 1943, 1944, 1945 and 1947.

Q. In reference to the year 1947 what did Lathourakis do?

A. He fished and was always the high boat man and was a very active man.

Q. What was his physical condition?

A. Very good.

Q. A strong powerful man? A. Yes.

Q. Did you know that he suffered an accident in 1948? A. Yes, I heard about that.

Q. Did you see him in 1949?

A. Yes, he was fishing for me this summer.

Q. Did you observe him during the season?

A. Yes. We live on same ship.

Q. Compare his physical condition of this season with other seasons prior to his accident.

A. Yes, I don't think that he was the same man he was a year ago.

Q. What was the difference?

A. This season he got tired after doing very little work.

Q. Did you observe whether he did his part of unloading the fish when he came to the delivery scows?

A. I had one of the deck hands help him as he could not lift his arms high enough to do it.

Q. He was supposed to do that himself?

(Deposition of Fred Sheils.)

A. Yes.

Q. Was he able to do equal work with his partner Coulas?

A. No, he was not. Coulas did two-thirds of all the work.

Mr. Roden: That's all.

R. E. Robertson:

Q. Mr. Sheils you were Supt. of cannery ship itself? A. Yes.

Q. Did you see Mr. Lathourakis during the day time?

A. Sometimes. I was on fishing grounds.

Q. How often did you see him fishing?

A. I couldn't say exactly. At least two or three times a week.

Q. Was he out in both good and bad weather fishing this year? A. Yes.

Q. How often did they unload at the floating cannery?

A. They unloaded at tenders instead.

Q. Were you out aboard the tenders?

A. Yes.

Q. How often did you see Coulas and Lathourakis boat fishing?

A. That would be hard to say.

Q. How often did you see them unload their fish at the tender? A. At least a couple of times.

Q. On these occasions you did not think that Lathourakis was doing his share?

A. No, I don't think he was.

(Deposition of Fred Sheils.)

Q. How far away were you?

A. Within a couple of feet.

Q. Did he work throughout the season?

A. Yes.

Attorney R. E. Robertson: That's all.

Commissioner Benson:

Q. From the work he was able to do this year would you employ him again next year?

A. That's hard to say. I took Pete on this year because he was a good friend of mine. However, I don't think he would get the same consideration from someone else. I didn't let him work after the season as fishermen are supposed to do to earn their run-money. Pete was all in so I told him to take it easy.

Q. You hired him as a fisherman because of personal relationship?

A. Not exactly. In other years he has always been high boat.

Mr. Robertson:

Q. Were they high boat this year?

A. No. They were 6th or 7th.

Q. How many boats did you have?

A. I had 21.

Mr. Roden:

Q. Pete was on top year after year wasn't he?

A. Oh, yes.

Mr. Roden: No further questions.

LETTER RE PETER LATHOURAKIS

May 20, 1949.

Roy E. Jackson, Attorney at Law,
American Building,
Seattle, Washington.

Re: Peter Lathourakis
Injured July 16, 1948

Dear Mr. Jackson:

Mr. Lathourakis came in this afternoon at your request for reexamination.

He is still about 26 pounds under his usual weight, due largely to shrinkage of muscle volume, and is unable to eat large enough meals to recuperate the loss. He has been trying to clean up his boat and do a little painting, and finds that he becomes very tired after two hours and has not been able to continue more than four hours, and that he has very little strength. The left chest wall becomes painful after an hour or so, and his right forearm cramps following work. He has experienced considerable abdominal and chest discomfort after meals, and is short of breath with effort, even walking a couple of blocks.

It would be more satisfactory to rate this man's disability after he has attempted fishing. At this time, it hardly appears that he will be able to develop the strength and endurance and eat enough food to enable him to do the work. At present, I would rate his disability as 65% of the maximum

for unspecified permanent partial disabilities for his chest and upper abdominal condition and general physical weakness, and 25% of the amputation value of the major upper extremity at the elbow on account of loss of strength, grip, and use of the forearm for work causing muscular cramps.

Very truly yours,

/s/ L. E. WILLIAMS.

Territory of Alaska
Alaska Industrial Board

No. 3889

PETER LATHOURAKIS,

Applicant,

vs.

LIBBY, McNEILL & LIBBY, a corporation,
Defendant.

DEPOSITION OF THORBURN S. MCGOWAN

(Called as a witness on behalf of the defendant.)

Pursuant to stipulation by and between the Applicant, by his attorney, Henry Roden, Esq., and the Defendant, by its attorney R. E. Robertson, Esq., the deposition of Dr. Thorburn S. McGowan, called as a witness on behalf of the defendant in the above-entitled matter, was taken on this 7th day

(Deposition of Thorburn S. McGowan.)

of July, 1949, at the hour of 11:00 o'clock a.m., at the Marine Hospital, Seattle, King County, Washington, before Ben F. Nelson, Notary Public in and for the State of Washington, residing at Suquamish;

The Plaintiff appearing by Roy E. Jackson, Esq., representing Henry Roden, Esq., attorney for the Applicant;

The Defendant appearing by Robert V. Holland, Esq., (of Messrs. Bogle, Bogle & Gates), representing R. E. Robertson, Esq., attorney for the Defendant.

(Thereupon, the following proceedings were had, and testimony given, to wit):

Mr. Holland: Let the record show that this deposition is being taken pursuant to the same stipulation previously referred to in this matter.

(It was stipulated by and between the parties through their respective representatives that all objections, except as to the form of the question, or the responsiveness of the answer, be reserved until the time of the hearing, and that the signature of the witness to his said deposition is waived, to which the witness himself assented.)

DR. THORBURN S. MCGOWAN

being first duly sworn as a witness on behalf of the Defendant, was examined, and testified as follows:

Direct Examination

By Mr. Holland:

Q. Will you please state your name?

A. Thorburn S. McGowan.

Q. And your occupation?

A. I am a surgeon.

Q. Are you presently employed?

A. I am employed by the United States Public Health Service as Chief of the Surgical Services in the Marine Hospital—the United States Marine Hospital.

Q. That is, at Seattle? A. Yes.

Q. How long have you been with the Public Health Service, Doctor?

A. I had one year with them in 1931, and I was in with them again since 1934.

Q. How long have you been in your present capacity at the Marine Hospital at Seattle?

A. I have been in the Marine Hospital for nine years, of which four were as Assistant Chief, and five as Chief.

Q. Prior to your coming to Seattle, you served with the Public Health Service elsewhere?

A. Yes, I have been doing the surgical Public Health Service since 1935, at various stations.

Q. How old are you, Doctor?

(Deposition of Thorburn S. McGowan.)

A. I am forty-two, sir.

Q. You graduated from what school?

A. From the University of Tennessee, sir.

Q. What year? A. 1932.

Q. Following your graduation there in 1932, will you tell us what specialized training or education you have had?

A. I had an interneship and a residency at the University Teaching Hospital at Memphis, which is now called the John Gaston Hospital, and following that I had training in surgery for the Public Health Service at Stapleton, which is a big hospital in New York.

Q. What type of work, if any particular work or type of work was followed during your residency?

A. I had training in general and orthopedic surgery.

Q. What did you follow at the Stapleton Hospital?

A. I have been in surgery since then in various capacities, first as assistant chief, and then as chief in one of the smaller hospitals, and then as surgeon at the United States Coast Guard Academy at New London, Connecticut; and then as surgeon at Manila, and then here as assistant chief. During the war I was assigned to the army for a period to build and activate one of the large hospitals in Alaska, and acted as chief surgeon there, and I returned here and became Chief of Surgery here in 1945.

(Deposition of Thorburn S. McGowan.)

Q. Will you state what professional organizations or societies you belong to?

A. I am certified by the American Board of Surgery. I belong to the American College of Surgeons. I am consultant in surgery at the University of Washington, and teach their students here, and operate a graduate training school in surgery which is recognized by the American Medical Association and the American College of Surgeons.

Q. Is the surgery which you teach at the University and in your graduate training school a general surgery?

A. It includes general surgery; orthopedic surgery and chest surgery.

Q. And you are duly and regularly licensed in the State of Washington?

A. I am licensed in the State of Tennessee, sir; not in the State of Washington.

Q. That is not necessary in the Public Health Service?

A. In the Public Health Service that is not necessary. I could apply for a reciprocal license if I care to, but I have not done it.

Q. Doctor, will you state what experience you have had, if any, with particular reference to chest surgery or surgery of the esophagus?

A. I have had approximately seven cases of esophageal surgery a year, and I have been doing these all that time I have been here. We have handled practically all of the various pathologic condi-

(Deposition of Thorburn S. McGowan.)

tions that have occurred in the esophagus. We see a large number of esophageal lesions for which no surgery is done, however.

Q. In this latter type of patient, is any diagnosis or observation made internally?

A. Oh, yes. I mean, we examine them and use the various studies, such as the use of barium or the passing of an esophagoscope or the other various procedures to make the diagnosis, and surgery is resorted to only in the instances where it is deemed advisable.

Q. Doctor, what area does this hospital serve in the Public Health Service?

A. This hospital covers the entire Northwest and Alaska.

Q. Now, Doctor, did you have occasion to observe or operate upon Peter Lathourakis?

A. Yes. May I refer to the records?

Q. Yes. You have for your use to refresh your memory the records pertaining to his case?

A. Yes.

Q. You may refer to them.

A. Mr. Lathourakis was in the hospital twice as an in-patient. The first time it was from September 6th to September 21, 1948, the second time from October 7 through November 2, 1948. He has been under observation as an out-patient at various intervals since that time.

Q. Doctor, by "in-patient" you mean a patient in the hospital?

(Deposition of Thorburn S. McGowan.)

A. Yes, in the hospital?

Q. And by "out-patient," you mean a patient reporting to the hospital from time to time?

A. Yes, for examination and treatment as indicated.

Q. Would you state then on what date you yourself first examined Mr. Lathourakis and what, if any, history he gave you at that time?

A. Yes, sir. The first date of the examination of Mr. Lathourakis was on the 6th of September. I believe that I saw him one day earlier, but I am not absolutely sure about that. At that time he stated that he was perfectly well until he had a crash injury to his chest and to his right arm when, while working on a small boat in Bristol Bay on July 16, 1948, he had a crash injury. After this, he was taken to the cannery or cannery tender, I don't know which, and at that time he was given stimulant—I think it was brandy—following which he vomited some yellow material. After this he noticed that he had difficulty swallowing solid food, and that he had pain in his epigastrium, in his chest, and in his arm. As I recall it, a cast was applied to the arm and he was sent down to Seattle where he saw his doctor, Doctor Bernard Gray. Due to his continued disability as far as the swallowing was concerned, Doctor Gray referred him to Doctor Julius Webber and Doctor Webber examined him with an esophaguscope. This was about the 10th of August.

(Deposition of Thorburn S. McGowan.)

It is my understanding that Doctotor Webber found a strictured area in the lower part of the esophagus, and took a piece of tissue for diagnosis. On pathological examination of the tissue, this was supposed to be a cancer, probably a very early one. He then had several X-ray studies in town, which showed a defect in this part of his esophagus, and because of this, since he was a seaman, Doctor Gray suggested that he enter the Marine Hospital for study and probable operation. At that time, when he entered the hospital, he said he was still unable to swallow meat.

Q. You have completed the history now?

A. The last thing, which I think I should say is, he was still unable to swallow meat, solid foods, and some liquids. He was slightly better at the time of his entrance than at the intervening time, and he was able to swallow any kind of liquids.

Q. Was that the extent of his complaint at the time you first examined him?

A. Yes, he was not complaining to any extent about his right arm at that time.

Q. Then, Doctor, would you state what diagnosis, if any, was made at that time and what was done for the man?

A. A tentative diagnosis of cancer of the lower esophagus was made, and, accordingly, the diagnostic tests were repeated. The X-ray examination showed an obstructive lesion at the junction of the middle lower third of the esophagus, which appeared

(Deposition of Thorburn S. McGowan.)

to be slightly less extensive than in the submitted films of 8/3/48. Barium passed readily through this area.

Q. Those films which you referred to, were they the ones taken previously in town?

A. Yes, they were; there were quite a number, and quite a number of our films with them.

Q. Would you just continue on any further diagnosis which you made?

A. An examination of the blood showed it to be within normal limits; the urine apparently was normal; the blood Kahn was normal; he had a normal range of proteins in his serum, and he had, on X-ray, some arthritis of his upper spine.

On September 15, an esophaguscopy was taken. The esophagoscope was passed down to a point about one and one-half inches below the aortic arch. That would be between two-thirds and three-quarters of the way down the esophagus. At this point the lining was reddened and showed swelling, and just at this point the size of the esophagus narrowed to the place where the instrument could not be passed further. At this point of stricture there was a bleeding, irregular area which extended about half way down the whole circumference. A piece of this area was removed to have it examined by the pathologist. The examination of this piece of tissue showed that there was chronic inflammation present, with some glandular areas which were hyperplastic.

(Deposition of Thorburn S. McGowan.)

Q. Would you explain what you mean by "hyperplastic"?

A. Well, when we say "hyperplastic," it means that the gland does not look entirely normal, but looks as though it had been growing rapidly and spreading out more than it normally would.

This was not, definitely, a cancer, however, on the section which was taken.

Q. Was that the report submitted by the pathologist?

A. Yes; that is what the pathologist said, sir. After we found this, we advised him to have an immediate operation, but he was reluctant to do this, and refused to have the operation at the time; and because of that he was discharged against medical advice.

Q. Would that be against your advice?

A. Yes, against the advice of the doctors here in the hospital. He agreed to return for examination every two weeks, however.

Q. Did he return, as requested?

A. He did not return regularly during that interval, but had the advice of Doctor Gray and several other private physicians who saw him between times, and I do not know all of the group who did see him. There was one Greek doctor, I think, whom he particularly placed confidence in, and because of that he came back to the hospital again on October 7 and entered the hospital willing to have an operation. In the meantime he had lost

(Deposition of Thorburn S. McGowan.)

further weight. He said that for a three-day period just prior to entering the hospital he was unable to swallow anything, and that this scared him and made him return.

Q. Would you state the course of treatment and/or operations on the second visit?

A. All right, sir. He was again re-examined and arrangements were made to have a blood transfusion. He was placed on penicillin by mouth, to cut down the amount of bacteria there normally present in the throat and in the esophagus, and on the night of October 10 he was prepared for operation in the usual fashion. You are not interested in all those details, are you?

Q. No, Doctor.

A. All right, sir. On October 11, he came to operation and at this time his chest was opened.

Q. Will you state, first, who performed the operation?

A. The operation was performed by me; by me with the assistance of Doctor Brockmeyer, Doctor Lawson and Doctor Metzmaker.

Q. Would you then describe the operation and the findings, Doctor?

A. Yes, sir. The chest was entered in the usual fashion by taking out—I will have to check to be sure which rib it was—we always X-ray them afterwards to be sure—I don't think that actual X-ray report is available here. It was probably the eighth rib. We usually remove the eighth rib, but some-

(Deposition of Thorburn S. McGowan.)

times we may differ. Yes, it says here it was the eighth rib which was removed, and the chest was opened up so that the lung could be pushed out of the area, and while the anesthetist had a tube into the trachea so that this lung could be collapsed but he could breathe through the passage.

Q. Is there a name for this operation?

A. Yes.

Q. Just what would you call it?

A. You would say that this would be an exploratory thoracotomy and an exploration of the mediastinum.

Q. All right, you may proceed.

A. When the lung was out of the way and the mediastinum was opened the esophagus was freed from its surrounding tissues, and at this time he was found to have a small but definite hital hernia of the short esophagus type. This hernia extended through the diaphragm approximately one inch and a half. Above this the esophagus was bound to all the surrounding tissues by an inflammatory reaction. This reaction extended upward to include the entire lower one-third and the lower portion of the middle one-third of the esophagus. The esophagus showed that its muscular wall was greatly thickened to a width of one centimeter. It was slightly irregular, and the entire inflammatory process extended over an area of about six inches. That is, roughly, correct.

Q. Doctor, is the presence of the inflammatory

(Deposition of Thorburn S. McGowan.)

process a normal or an abnormal condition?

A. That is a very abnormal condition, sir. Because of the inflammatory process present the esophagus was opened, and two specimens of tissue were sent to the pathologist for a frozen section. The frozen section again showed evidence of chronic inflammatory reaction, and the presence of these glands which were abnormal in their appearance. There was no evidence of a cancer in this section. To be sure that the part of the process was not cancer, two additional pieces of the esophagus were removed from different area and sent to the laboratory for section later.

Q. How is that?

A. For section, or, I should say, examination, later. Because of the great extent of the inflammatory process, and because, on opening the esophagus and looking up it the inflammatory reaction extended as far as could be seen, it was decided only to do a plastic procedure to enlarge the strictured area, that is, the constricted area. This was done by splitting the diaphragm and bringing the stomach up into the chest on that side, and putting the stomach up to the middle third of the esophagus and sewing the two together, so that there would be an adequate opening from the stomach into the esophagus. The diaphragm was then sewn to the side of the stomach, and the stomach was supported in its position by sewing it to the chest wall and to the vertebral column, and the lung was re-expanded and the chest was closed.

(Deposition of Thorburn S. McGowan.)

His recovery was a good one, with no infection following. It was slow, as is usual in such cases, because first a tube had to be left running through the esophagus into the stomach. He recovered to the point where he could have the tube removed, and be given solid food, which he could then swallow without difficulty. A check up X-ray examination was done on November 1st, to be sure that he could use the esophagus satisfactorily. This showed that he was able to swallow the barium without difficulty, and that the barium entered the stomach. It showed that the stomach was approximately half way above the diaphragm and into his chest.

Q. When was the next time he was seen by you after November 1st, Doctor?

A. He was seen at regular intervals until he was discharged from the hospital on November 2nd, and has been seen as an out-patient at various intervals from that time on.

Q. Doctor, did you personally see this man on the occasions of the various visits he made as an out-patient?

A. I have seen him on the majority of his visits, and have supervised the medication which he has been taking.

Q. What was his condition at the last time you saw him?

A. At the last time when he was seen, he was able to eat solid foods without difficulty. He had regained much of his strength and weight, but

(Deposition of Thorburn S. McGowan.)

stated he was not as strong as he had been before this difficulty. His blood count was satisfactory, and he was maintaining his nutrition and gradually gaining weight.

Q. Doctor, what would you say as to whether or not he had, at least at that time, any permanent disability from this operation?

A. I would estimate that there is some definite disability present. It is still too early to determine accurately how much disability is present, but whenever such an operation is done the man is not in as good condition as he was previous to this time. There is one other thing that I think should be said, and that is, because of the actual nature of his lesion in the esophagus, which is analogous to ulcer of the stomach, he may have further flare-ups in the future, which cannot be anticipated. He is being carried on a special diet, and in the use of certain medicines to prevent, if possible, any such occurrence.

Q. Doctor, will the diasability which the man had at the time you last saw him, decrease during the course of further convalescence?

A. We would expect it to decrease materially.

Q. Doctor, would you, without reference, unless necessary, to complicated medical terms, describe what is in front of the esophagus.

A. That is, starting from the skin in?

Q. Yes.

A. You have, first, the bony cage of the chest,

(Deposition of Thorburn S. McGowan.)

which completely protects the organism on the inside; next to this, in the center, is the space called the mediastinum, and directly below the breast bone is the heart.

Q. When you say "below," you mean under?

A. Yes, that is correct. In back of it, shall we say. In back of the breast bone is the heart; and just in back of the heart, on the upper part of the mediastinum, is the trachea, which then separates into the bronchial tubes for the lungs. Just in back of the trachea lies the esophagus. This is just in front of the vertebral column which supports the back.

Q. That is, the spine?

A. Yes, sir; that is the spine. In back of this are the powerful muscles which hold the spine erect at all times.

Q. Doctor, did you, in your exploratory thoracotomy observe any damage to the area immediately in front of the esophagus, that is, any of the items which are located in front of the esophagus?

A. None whatsoever.

Q. In your examination, was it possible to observe any condition like that, if it were present?

A. Yes. We have to push the heart aside to get to the esophagus; we see the lungs and all the intervening tissue, and the backbone, or spine in back.

Q. Doctor, from your observation of the esophagus when you opened the preliminary organs, did you then form any opinion as to whether the condi-

(Deposition of Thorburn S. McGowan.)

tion of the esophagus was one which commenced at the outer wall of the esophagus and went inward, or started from the inside of the esophagus and went outward?

A. Yes, sir; in my operative notes I think that is clearly brought out. It says: "When the esophagus was opened, the mucous and the submucous were found to be one centimeter thick in places noticeably scarred, with evidence of inflammatory process, which, however, appeared limited by the muscular coat." In other words, the muscular coat limited the process, so that it did not come from the outside in, but came from the inside out.

Q. Doctor, from the history which you obtained from the man on his original and subsequent visits, did he ever report to you any blow prior to the accident?

A. He initially said that he received a crush type of blow to both the right arm and the chest.

Q. Did he indicate any particular portion of the chest?

A. To my knowledge, he did not say what part of the chest, sir, but when he came to us he still had a little swelling of the right arm, but there was no evidence of any blow or bruise to the chest.

Q. Doctor, would you compare the blow to the right arm and the chest as to their respective recuperative values, under a blow of equal force?

A. I would say that one should recover as quickly as the other. In other words, I don't be-

(Deposition of Thorburn S. McGowan.)

lieve that the blow, so far as the initial blow was concerned, could have been any greater to the chest than it was to the forearm.

Q. Now, Doctor, the allegation in this case is that the man received, as stated by you, a blow to the chest, of such force which cannot, of course, be accurately noted or gauged, and I will ask you, from your education and experience if you formed an opinion at that time, or if you have any opinion now as to whether or not a blow of any force or intensity to the chest which would not injure any of the organs in front of the esophagus, could have resulted in the conditions which you found in the esophagus? A. I don't think so.

Q. Why?

A. For this reason: in the first place, my experience has been that any severe blow to the chest, if at all severe, should cause, first, a fracture of the ribs or the sternum; and he had no such fractures. In the second place, the esophagus is the most protected organ in the chest. It is in the center, surrounded by other organs, and by loose tissues which would take up any actual blow. It is not conceivable to me to have the esophagus directly injured by any external blow unless the blow penetrates the chest.

Q. Doctor, assuming the evidence to be, as indicated from your history, that this man vomited a certain amount following the accident. What would your opinion be as to whether or not that vomiting or regurgitation could cause the condition which you found in the esophagus?

(Deposition of Thorburn S. McGowan.)

A. I rather question that, because of this, that we see many people come in who vomit following accidents, many people who are drunk who vomit alcohol and alcholic contents following accident, and yet I have never had a similar case brought into the hospital, so that I feel that while vomiting might just temporarily for a matter of two or three days flare up in the condition that he had present, I am sure that this condition must have been present before; for two or three other reasons: in the first place, the thickness of the wall which we found at operation, some three months following his injury, could hardly have developed into such a condition if such a process had not been already present. In the second place, this man has a developmental anomaly. He has in his esophagus the same kind of glands that are normally present in the stomach; and this is the reason why he can get the equivalent of a stomach ulcer in his esophagus.

Q. Doctor, would the presence of these glands, in your opinion, being in the esophagus, rather than in the stomach, have been caused by a blow which we have described?

A. No, sir; those glands have been present to a certain degree from birth.

Q. I will ask you then, in your opinion, could the presence of the glands in the esophagus have been caused by the vomiting which was a part of the patient's history after the accident?

A. No, sir; the glands had been present congenitally.

(Deposition of Thorburn S. McGowan.)

Q. Doctor, in your opinion, were the findings, which you have described, upon the thoracotomy sufficiently explanatory of the condition of the stricture in the man's difficulty in swallowing food, as described to you?

A. Yes, sir; that is another reason why I don't feel that the blow in July, 1948, caused the condition. He definitely had a strictured condition, which was present even when he was first examined by Doctor Webber in August, and that is only one month, or less than a month, from the time he had the initial injury; and even in cases where people swallow caustics such as lye, a stricture rarely develops that rapidly—a complete stricture rarely develops that rapidly. So, obviously, you feel that he had had this for a considerable period of time. And the other thing is, the stricture develops because scar formation has to occur. The scar formation occurs slowly, and because of that you again feel that the process had been going on for a considerable period of time. The way it happens is this: you first get an ulcer, and the ulcer has to persist for a considerable period of time. The body tries to repair the ulcer, and a scar results; and then over a considerable period of time the scar contracts and you get what we call a stricture or a narrowing of the esophagus.

Q. Doctor, assuming that the man had never experienced any complaint such as difficulty in swal-

(Deposition of Thorburn S. McGowan.)

lowing prior to this accident, in your opinion, what sort of a blow to the chest wall would be necessary to aggravate the condition which you have indicated probably was there since birth?

A. I cannot see how any blow to the chest could aggravate such a condition directly. I had a case very similar to this approximately a year and a half ago, to illustrate this point, that is, the ulcer angle. I had a Swedish seaman who had an ulcer in his stomach, for which he had to have an operation. The operation was done in our New York hospital. He had had no difficulty at that time swallowing, but in approximately nine months when he came here he had difficulty in swallowing, and on examining him we found a similar condition in his esophagus, occupying the lower third. We did a similar operation for him, and he recovered, and is back on a Swedish boat as a seaman. That is to show you, when you have these glands there normally present in the stomach, in the lower third of the esophagus, you can get an ulcer there just as you can get an ulcer in the stomach.

Q. Doctor, will you waive the signing of the deposition after the reporter has typed it up?

A. Yes, sir.

Mr. Holland: That is all the questions I have.

(Deposition of Thorburn S. McGowan.)

Cross-Examination

By Mr. Jackson:

Q. Doctor, the first time you saw Mr. Lathourakis was September 6, 1948?

A. I think so; September 5 or 6. Doctor Gray called me about him, and he came up to see me as an out-patient; and then I had him admitted on the 6th. So it might have been one day before.

Q. That was approximately three months after the accident?

A. Yes; July, August and September, yes, sir.

Q. Now, did you go into any detail with him as to how the accident occurred?

Mr. Holland: With the doctor?

Mr. Jackson: Yes. With Mr. Lathourakis.

Q. (By Mr. Jackson): Did you talk with Mr. Lathourakis as to how he was standing and how the boat struck the barge?

A. No, I didn't. He merely told me he was on the boat when the barge struck the boat, or the boat struck the barge.

Q. Did he tell you he was standing at the bow of the boat at the time the boat struck the barge, and it was a matter of trying to save himself from being killed or drowned?

A. I understood he was afraid he might get thrown overboard, yes, sir. He said he was struck; he didn't say where.

Q. Did he tell you he was scared to death at the time? A. Yes, he did, sir.

(Deposition of Thorburn S. McGowan.)

Q. And you doctors recognize fright?

A. Yes, we do.

Q. And, Doctor, did he tell you that he had a crash injury to the chest and to his right arm?

A. Yes.

Q. And did he tell you how his chest was struck, and just what his chest struck?

A. As I recall, a mast or spar, or something like that, sir.

Q. Did he tell you, immediately following that, he was in severe shock?

A. He said that he was struck, that he had to be taken off the boat to the cannery. He didn't say anything about shock at the time.

Q. Would you assume that he was in severe shock following such an accident?

A. I would assume that in all probability he was in shock, but how severe I would not know.

Q. Did he tell you he was numb from his throat down to the bottom of his stomach?

A. No, sir, I don't regard that as shock, sir. That is, I don't think that is one of the signs of shock.

Q. I asked you if he told you that?

A. No, sir, he did not.

Q. Would that be of any significance to you if he had told you that immediately following this accident he was numb from his throat down to the bottom of his stomach?

A. No, sir.

Q. That would have no significance?

(Deposition of Thorburn S. McGowan.)

A. I don't think it would have any significance in this case at all.

Q. Did he tell you he immediately vomited following the accident in the boat?

A. I understood he vomited; I don't know when, sir. But, as I recall it was after they gave him the brandy.

Q. Do you remember whether he told you he had vomited in the boat? A. I don't recall, no, sir.

Q. That, I suppose, would not have any significance?

A. I don't think that would affect the actual injury to the esophagus, unless there were other signs to go with it, because, in a number of folks, they get sick at their stomach after a harrowing experience; we see that quite often.

Q. He did tell you he was unable to swallow following this accident?

A. As I recall it, he stated being unable to swallow a day or so later. He was able, as I recall it, to swallow the brandy, or whatever they gave him. He swallowed that without difficulty. When he first noticed he could not swallow was when they were feeding him solid foods.

Q. Now, did you get any history from him to the effect that when he took this brandy he immediately vomited again?

A. He stated he vomited after he took it.

Q. Did he also tell you he tried to drink a cup of coffee after he came to the hospital, and he vomited again?

(Deposition of Thorburn S. McGowan.)

A. As I recall, he told me he vomited several times; and that is all I can tell you. I don't know what he drank the second time.

Q. Doctor, I would like to ask you this, if the fright that he had, that Mr. Lathourakis had at the time of this accident and the regurgitation and vomiting that followed—whether that would produce a spasm in the esophagus?

A. A temporary spasm, yes.

Q. And the spasm in the esophagus would impair his swallowing?

A. Temporarily, sir.

Q. Temporarily?

A. In other words, we see that every so often. We call it globus hystericus. We see people who have an experience like that, and they say they cannot swallow because they get a lump in their throat; and that practically always is temporary.

Q. In this case, did Mr. Lathourakis tell you that he had this difficulty in swallowing immediately after or shortly following this accident, and that he has had it ever since the accident down to the time that he came to see you in September; is that correct?

A. Yes, more or less. It was worse sometimes than it was at others.

Q. Now, Doctor, I would like to ask you if such a blow, such an accident as Mr. Lathourakis had, would produce a compression of the upper abdomen?

(Deposition of Thorburn S. McGowan.)

A. I don't know, sir. I don't see that striking the chest would cause the upper abdomen to be compressed particularly, sir.

Q. Now, assuming the upper abdomen was compressed, would that squeeze the gastric contents from the stomach into the esophagus?

A. Not necessarily.

Q. I asked you if it could, if he had compression of the chest or the upper abdomen? Would that cause the contents of the stomach to be squeezed into the esophagus?

A. Only under certain circumstances, sir. Normally there is what we call a muscle accumulation at the junction between the esophagus and the stomach, and normally that holds; if you compress it hard enough, you could certainly do it, but I would think it would take quite a severe pressure.

Q. But it can happen?

A. I would imagine it is possible to happen, sir, yes.

Q. Now, Doctor, this thickening of the wall of the esophagus that you spoke of, how far is that, in inches, from the opening into the stomach where the esophagus opens into the stomach?

A. It started approximately at the point where it opens into the stomach and extended upwards, roughly, for at least, let me see, eight or nine inches.

Q. Now, Doctor, assuming you have a compression of the chest which would squeeze the gastric

(Deposition of Thorburn S. McGowan.)

contents of the stomach into the esophagus, would such a procedure, squeezing the gastric contents of the stomach into the esophagus, have produced an overstrain on the esophagus?

A. Just a moment. I don't think you meant what you said. Let me tell you what you said.

Q. All right.

A. You said that, assuming a compression to the chest.

Q. Of the upper abdomen, I mean.

A. That is what I meant; you did not state that.

Q. I mean the upper abdomen.

A. Would you then give me the question again?

Q. All right. Assuming that we have in this case, assuming that in this accident Mr. Lathourakis had a compression of the upper abdomen which would squeeze the contents of the stomach into the esophagus, would such a happening or occurrence produce a strain upon the esophagus?

A. Not any more than when you vomit, normally, because you then force the contents of the stomach up, just from the contraction of the stomach itself, and you bring it all the way up; and people vomit many times and nothing happens, the difference being in Mr. Lathourakis' case, that he has something that most of us probably do not have, glands that are exactly like the stomach glands, which are making gastric juice in his esophagus rather than making the gastric juice in the stomach, don't you see?

(Deposition of Thorburn S. McGowan.)

Q. Assuming that we have a compression of the upper abdomen following an accident such as Mr. Lathourakis had, and this forced the gastric contents from the stomach into the esophagus, and you had a narrow esophagus at that particular point. Wouldn't such a happening aggravate this abnormal condition that you spoke of, that has existed in the lower end of the esophagus?

A. Only temporarily, sir.

Q. But it would aggravate it?

A. I think to a certain extent, for a matter of a day or so, yes.

Q. Now, Doctor, if that condition was aggravated temporarily, and that same aggravation continued for months following the accident, would you say then that there was just a temporary aggravation of that condition?

A. You are giving me a hypothetical question to start with, and then you are changing it, so it is difficult to answer. In other words, you say if it was a temporary aggravation that continued, and would I then say it was a temporary condition. He had apparently one blow, and that is all, and that is a temporary thing and is a limited thing. That is why I say it might have aggravated the condition for a matter of twenty-four to thirty-six hours, but it would not have aggravated it from that time on.

Q. Assuming you have an aggravation of that kind, what would you expect to observe in the esophagus at that point?

(Deposition of Thorburn S. McGowan.)

A. In Mr. Lathourakis' esophagus?

Q. Produced during this period of aggravation; what would you expect to find?

A. At that time I would expect to find that the lining was more swollen than usual; I would expect to find it might be a little redder than usual, although I think that Mr. Lathourakis would at that time already have shown ulcers present from the abnormal glands present there, and I don't think the forcing of the contents up temporarily would make much difference, for this reason: because the same contents that is being forced up is being manufactured by the glands that he has there, don't you see, twenty-four hours a day.

Q. Would you expect to find a swelling and a redness? A. Yes.

Q. I think you have spoken of esophagitis?

A. That is an inflammatory affair; that is an inflammatory affair in the lining of the esophagus.

Q. Would you expect to find mesophagitis following such an accident?

A. If he had a normal esophagus, you would expect to find a temporary, acute flare-up, but not the chronic condition that we found in his case, sir.

Q. Now, if you superimpose the fact of the abnormal esophagus a further strain—a further strain upon the already weakened wall in the esophagus, then you would have a worse condition than would have been produced otherwise; isn't that true?

(Deposition of Thorburn S. McGowan.)

A. I don't believe so, sir. For instance, you say, "a strain upon the already weakened wall in the esophagus." I don't think the wall was weakened at all. The wall was contracting down; it was cutting down; it was thicker than usual, but it was not a weakened wall.

Q. Then you did have an abnormal wall?

A. Yes, certainly, it was an abnormal wall.

Q. So it would take a greater force to push the contents out of the upper abdomen from this blow.

Mr. Holland: Assuming the pressure was on the upper abdomen.

Mr. Jackson: Yes, of course.

The Witness: In other words, you are giving me a hypothetical case.

Mr. Jackson: Predicated on the evidence in this case that he had a crushing blow to his chest.

The Witness: I disagree with you there. You speak in one case of a blow to the upper abdomen and then you change it to the chest. You have given me hypothetical questions now relating to the upper abdomen. I have been trying to answer the questions that you have given me, but you are now changing it.

Q. (By Mr. Jackson): Can you say that a crushing blow such as Mr. Lathourakis had to his chest did not compress his upper abdomen? Can you say that?

A. I feel, if it had, he should have had some evidence of injury there, which apparently no one has found.

(Deposition of Thorburn S. McGowan.)

Q. What evidence would you find?

A. I think you should find bruising of the upper abdomen. You might find a scratch, if it had been abraded; I think you would be expected to find it very sore; and his complaint to the doctors and to me was about his chest, and he didn't complain of his abdomen hurting.

Q. Did he tell you that he was black and blue in the chest and in the arm?

A. He said his chest was discolored, and that his arm was discolored.

Q. Do you recognize, Doctor, ruptures of the esophagus?

A. I have seen only one actual rupture of the esophagus.

Q. That is all you have seen?

A. Yes, sir; they are very infrequent, sir.

Q. Do you recognize that a rupture of the esophagus can occur as a result of a blow to the chest which causes a compression of the upper abdomen?

A. I would not feel that any rupture of the esophagus would occur unless you had a most severe blow which would cause associated fractures of the ribs, and other things.

Q. That is what you feel? A. Yes.

Q. Are you familiar with a work entitled "Trauma in Internal Diseases," prepared by Doctor Rudolph A. Stern, Assistant Attending Physician, City Hospital, New York City, which was prepared during the year 1945?

(Deposition of Thorburn S. McGowan.)

A. I do not happen to know that, sir.

Q. I would like to ask you this question, or read this to you, and ask you if you will agree to this: "Injury to the esophagus. Traumatic rupture of the esophagus has been observed by many authors. In such cases a severe compression of the upper abdomen squeezes the gastric contents into the esophagus, which is over strained and ruptured." Would you agree with that, Doctor?

A. I think you would have to have a tremendous force, sir, but I am sure it could happen if you had put on enough force.

Q. Then a lot depends on the extent of the blow that you have to the chest and upper abdomen?

A. I disagree with you there. You are talking about the upper abdomen. A blow to the chest, I don't believe, will rupture the esophagus. I don't think it will rupture the esophagus until it has broken many ribs, and until it has very probably ruptured other organs. Actually you will find you get punctured lungs, and that you would get damage to other organs before you would get damage to the esophagus.

Mr. Holland: I would like to make objection to this line of questioning for the record in which counsel alternates between the terms "upper abdomen" and "chest."

Mr. Jackson: I was speaking of a blow to the abdomen.

(Deposition of Thorburn S. McGowan.)

Mr. Holland: That is assuming something that is not in evidence.

Q. (By Mr. Jackson): Do I understand that you take the position that Mr. Lathourakis did not have a blow following this accident to the upper abdomen?

A. In my opinion, sir. The history which he gives to some five or six various people here in no place refers to a blow to the upper abdomen. He told me personally that he struck his chest and right arm. I don't know anything about a blow to his upper abdomen, because he has never complained to me about it.

Q. Doctor, will you tell me where the upper abdomen is? What part of the anatomy is the upper abdomen?

A. As the usual thing, the upper abdomen is referred to as the space between the umbilicus, or belly-button, and the chest cage, as the margins of the chest.

Mr. Holland: Which margins, Doctor?

The Witness: The rib margins, as they swing down on either side; but that is a rather loose term, and when people refer to the upper abdomen, they usually mean as far down as the bladder.

Q. (By Mr. Jackson): When you speak of the chest and upper abdomen, they are right close together? A. Yes, they are, sir.

Q. If you were struck a severe blow, if you were up against a mast and your boat hit a barge,

(Deposition of Thorburn S. McGowan.)

and if you struck the mast with your chest, your abdomen would be involved, would it not?

A. Not necessarily. I don't know, exactly, sir.

Mr. Holland: I object to the question. The doctor is not qualified as a longshoreman or as a sailor, sufficient to know where a mast would strike.

Q. (By Mr. Jackson): What is a cardiospasm?

A. A cardiospasm is a complex thing, which has several different definitions. It refers, usually, to spasms of the muscle at the junction between the stomach and the esophagus, sir. It is a symptom complex, because people feel that it can be produced by one or two or three different things, sir.

Q. Doctor, have you had occasions to observe cardiospasm following injuries to the chest and upper abdomen?

A. I have operated on about seven or eight such cases in the last five years, sir, and I don't recall any of them coming as a result of an injury. Now, there is another technical term that we use for the condition that I am talking about, and that is "achalasia," and under that situation, you might say that is what we might call a chronic cardiospasm, and it gives usually a very characteristic picture in which the lower end of the esophagus balloons out because of the difficulty of the food passing through this junction between the esophagus and the stomach, and finally the lower part of the esophagus gets dilated and often as big around as your arm, and the muscle fibre at the junction be-

(Deposition of Thorburn S. McGowan.)

tween the stomach and the esophagus gets thickened, and under those circumstances we usually operate on them, although we first try to force a dilation. That is an entirely different condition than we found in Mr. Lathourakis' case. The stricture there is in a different place, and it really has no connection with the thing that we found on Mr. Lathourakis. I will be glad to tell you anything more about it, if you want.

Q. You admit this, Doctor, that fright, such as Mr. Lathourakis experienced, could produce a spasm in the esophagus which would prevent swallowing? A. Yes, temporarily.

Q. And you also admit this, that vomiting—that fright together with vomiting would produce a spasm in the esophagus?

A. A temporary one, yes, sir.

Q. And then, Doctor, when Mr. Lathourakis gave you the history in this case, saying that he had never experienced any difficulty in his life prior to this accident with swallowing, did you believe him?

A. I imagine that is probably the way he felt about it, and that is what you say; it is probably true that is the way he felt about it.

Q. Did you have any reason to disbelieve him at any time?

A. I did not disbelieve him. I have found that often patients have things that are present that they are not aware of until the thing is brought to their attention.

(Deposition of Thorburn S. McGowan.)

Q. Doctor, I would like to ask you this: in your opinion, did Mr. Lathourakis have a spasm in the esophagus following this fright and the vomiting after this accident, which prevented swallowing?

A. I think he undoubtedly had a temporary spasm, sir.

Q. And would it be your opinion that the inability to swallow was caused by a spasm in the esophagus following this accident at least for a period of twenty-four to thirty-six hours?

A. Yes, sir; I think that is reasonable, sir.

Q. You have the history in this case. Let me put it this way: such a spasm would aggravate the condition that existed in the esophagus for at least twenty-four to thirty-six hours?

A. Yes, I think that would be reasonable. Not the spasm, sir, but the possibility of the regurgitated extraction of gastric juice; I think any aggravation would come from the regurgitated gastric juice rather than the spasm.

Q. And fright does not have any effect upon gastric juice, severe fright?

A. I don't believe you are going to have any permanent change in gastric juice from fright.

Q. But temporarily?

A. I think temporarily it might have had some slight effect, but I don't think it would have a great effect. In other words, I think the vomiting is a greater factor than fright. In other words, I think fright is a minor factor.

(Deposition of Thorburn S. McGowan.)

Q. But the vomiting is a factor in aggravating the condition?

A. It is the biggest factor that causes temporary aggravation.

Q. You think the temporary aggravation would not last over thirty-six hours?

A. In a normal person, it would not.

Q. I am speaking now of the aggravation in this case, superimposed upon the condition that Mr. Lathourakis had; you think the aggravation in his case would last more than thirty-six hours?

A. No, sir; because his glands in the esophagus all the time are producing the same gastric juice as the stuff that is coming from the stomach.

Q. You have never seen a case of an accident such as Mr. Lathourakis had, superimposed upon this condition, have you?

A. No, sir; I certainly have not. I have seen a case similar to his, which I described to you, in another seaman, and I described it to you, where this man had an ulcer, just as he had, because he had ulcers like the glands in the stomach, in the wrong place.

Q. Do you recognize, Doctor, that you physicians, taking the same history as we have in this case, would disagree as to whether or not this accident such as Mr. Lathourakis had would either produce or aggravate conditions such as Mr. Lathourakis had in the esophagus?

Mr. Holland: That is argumentative.

(Deposition of Thorburn S. McGowan.)

A. I think the more experience men have with lesions of the esophagus, the less question there would be and the less disagreement there would be.

Q. (By Mr. Jackson): Let me ask you if you doctors do not disagree?

A. Well, sir, I can only say this: that Doctor Blackman who saw Mr. Lathourakis with me—this is hearsay, because I did not see his report. If it is true, it is true on the basis of what you have told me. I have not been told directly. I do not question it now, because of what you are telling me. As I recall it, he was examined by Doctor Pinkham. He went over the case and the slides here, and I believe, although I am not absolutely sure, I think that he agreed with what I said about it at the time; but I don't know whether he did or not, because he did not give me the report.

Q. As a matter of fact, Doctor Pinkham stated that he could not say that the accident did not aggravate the condition.

Mr. Holland: The doctor stated he has not seen his report.

A. If you say that he did that, that may be what he did. He was talking to me when we were going over the slides, and in doing that he said he felt that he thought we were right in what we thought. However, I have not seen these other reports, Mr. Jackson.

Mr. Jackson: I think that is all.

(Deposition of Thorburn S. McGowan.)

Redirect Examination

By Mr. Holland:

Q. I have just a few questions further, Doctor. Would the type of spasm caused by fright in a situation as described by Mr. Jackson, cause temporary impairment of a normal esophagus?

A. Yes, I think it could do that.

Q. And, Doctor, would a regurgitation and vomiting following an accident of this type aggravate temporarily, by reason of the fact that stomach acids and juices would be forced upward, a normal esophagus? Would that aggravate a normal esophagus? A. Yes.

Q. Doctor, what bony structure, if any, is in front of the upper abdomen?

Mr. Jackson: I think he has already answered that. There is no bony structure.

A. There is no bony structure in front of the abdomen; there is a bony structure in front of the chest. However, you might say, on either side the bony structure curves down and guards the upper abdomen, but there is no bony structure that lies directly in front of it, sir.

Q. Doctor, did Mr. Lathourakis at any time in his conferences with you in giving his history, indicate manually to you the area where he claimed he was struck on the chest?

A. He used his hands, stating that he was struck here (indicating); that is all I can tell you, because Mr. Lathourakis does not use English as fluently

(Deposition of Thorburn S. McGowan.)

as you or most of us do, and he patted his chest with his hands like this (indicating).

Q. He indicated it with his hands?

A. Yes, he said it was his chest here (indicating).

Q. And your observation of the spot that he indicated was that it was his chest?

A. It was definitely his chest. I knew nothing about any blow that he may have had to his abdomen, and, according to the records—I might check again. I just went through them. I don't think that any of the three or four doctors said so. In the first record it says "chest and arm"; in this record it says "chest and arm"; in this next record, apparently, it says that he gave no history except an interim report, and that had nothing to do with either the chest or arm, either, sir.

Q. Doctor, are those reports that you have there various reports prepared by other doctors in the hospital than you?

A. Yes; that covers approximately three other doctors than I who have recorded that, and in every instance it is recorded as "chest and arm."

Mr. Holland: I have no further questions.

Recross-Examination

By Mr. Jackson:

Q. I have a couple of questions I want to clear up.

A. (Interposing): Would you just let me look here for a moment to see whether there is anything

(Deposition of Thorburn S. McGowan.)

about his abdomen? No, sir, there is no record of anything in here of anything except the chest and arm.

Q. I would like to ask you, Doctor, this question: Mr. Lathourakis at the present time has lost the use of the eighth rib? A. Yes, sir.

Q. On which side?

A. Just a second. Suppose I get the X-ray and settle it for you. Would you mind if I did that?

Q. I don't know whether it is necessary.

A. I think it is the left; yes, it is on the left side.

Q. And is his lung that you collapsed in the same position, or has that been moved?

A. No, sir; the lung is in the same position.

Q. The stomach is out of position?

A. The stomach is about half way up into the chest, sir.

Q. And that is sewed on to what?

A. It is sewed on to the tissues around the backbone.

Q. It is sewed on to the tissues around the backbone?

A. That is the best way to describe it, I think, so that you will understand it.

Q. He has complained of shortness of breath?

A. Yes, sir.

Q. What would the shortness of breath be due to?

A. That would be due to a number of things; I couldn't tell you all of them. I could go over them,

(Deposition of Thorburn S. McGowan.)

but I would say that you could expect some shortness of breath from the operation, bringing the stomach up into the chest.

Q. And when you move the stomach up into the chest, doesn't that move the lung out of place?

A. The lung is elastic, and the lung occupies the remaining space. The X-ray shows his lung has completely re-expanded and occupied the remaining space. Obviously, when you bring the stomach up, there is some diminution in space, and I would estimate that he lost about one-thirtieth of his total available space inside the chest.

Q. And didn't one of those reports say there was some lack of excursion?

A. Well, I believe you might find by reading more closely, that would probably be the diaphragm and not the lung, because you are not able to catch the movement of the lung as well as you can the diaphragm, because the lung fills up the space that is available therein; you can actually see the diaphragm move but you cannot actually see the lung move as well.

Q. You spoke of finding a hernia?

A. Yes.

Q. Was that hernia of recent origin?

A. No, sir. That I could tell. If I refer to my notes, I can tell you definitely. That was referred to as a hernia of the short esophagus type, which is usually thought to be congenital, although it might not be. There is a little dispute among the doctors

(Deposition of Thorburn S. McGowan.)

about that now, but, at any rate, it is a hernia of long standing and has nothing to do with any recent occurrence.

Q. Was that hernia repaired? A. Yes, sir.

Q. The hernia at that time, was it producing any trouble?

A. I don't think it was, sir. It is common to find in many individuals hernias which have no symptoms. It was a very small one. I mean I would regard it as an incidental finding.

Mr. Jackson: I think that is all.

Redirect Examination

By Mr. Holland:

Q. Doctor, when Mr. Lathourakis has completely convalesced, if he had not at the time you saw him, would you give any opinion as to any permanent disability which would remain to him?

A. Yes, sir. I think Mr. Lathourakis will have a definite partial disability which will include an inability to do certain types, or, rather, to eat certain types of food which may produce more gas than usual, and the possibility that he may develop further ulcerations of any abnormal glands which he has.

Q. In terms of a man being able to work, could you give us any percentage?

A. I would rate Mr. Lathourakis at the present time, or, excuse me, at the time of his complete con-

(Deposition of Thorburn S. McGowan.)

valescence as being between twenty and thirty per cent disabled.

Mr. Holland: I have no further questions.

Recross-Examination

By Mr. Jackson:

Q. How much was he disabled when you saw him last?

A. At the present time I could not tell you, but I could get it from the records, if you would be interested, sir.

Q. You do not know at the present time?

A. At the present time, sir, I have not seen him for, I think, at least a month; so I could not tell you what his disability is.

Q. But you would assume that it would be more than twenty or thirty per cent? A. Yes.

Q. Around thirty to forty?

A. I would assume it would be around forty per cent.

Mr. Jackson: That is all.

Mr. Holland: That is all.

(Witness excused.)

(Deposition concluded.)

Certificate

State of Washington,

County of King—ss.

I Hereby Certify that on the 7th day of July,

1949, before me, Ben F. Nelson, a notary public in and for the State of Washington, at the Marine Hospital, Seattle, King County, Washington, personally appeared pursuant to stipulation between the parties, beginning at the hour of 11:00 o'clock a.m., Doctor Thorburn S. McGowan, called as a witness on behalf of the defendant in the above-entitled matter; and

Roy E. Jackson, Esq., appearing on behalf of the applicant, represented by Henry Roden, Esq., his attorney.

Robert V. Holland, Esq. (of Messrs. Bogle, Bogle and Gates), appearing on behalf of the defendant, representing R. E. Robertson, Esq., its attorney.

The above-named witness, being by me first duly sworn to tell the truth, the whole truth and nothing but the truth, and being carefully examined, deposed and said as in the foregoing transcript of deposition set out.

I Further Certify that the said deposition has been reduced to typewriting under my personal direction, by a competent person, and that the deposition is a correct transcript of the testimony as given by the witness, and that the same has been retained by me for the purpose of sealing up and directing the same to the Clerk of the Board, as required by law.

I Further Certify that the reading over by or to the said witness of the said deposition, and the transcription of the said witness to his said deposition, were by the parties hereto, and the witness himself, expressly waived.

I Further Certify that I am not of counsel or attorney to either or any of the parties, nor am I interested in the event of the cause.

Witness my hand and official seal at Seattle, Washington, this 11th day of July, 1949.

/s/ BEN F. NELSON,
Notary Public in and for the State of Washington,
Residing at Suquamish.

DEPOSITION OF DR. A. BERNARD GRAY

Called as a witness on behalf of the defendant.

Pursuant to stipulation by and between the Applicant, by his Attorney, Henry Roden, Esq., and the Defendant, by its attorney, R. E. Robertson, Esq., the deposition of Dr. A. Bernard Gray, called as a witness on behalf of the Defendant in the above-entitled matter, was taken on this 22nd day of June, 1949, at the hour of 1:00 o'clock, p.m., at 602 Central Building, Seattle, King County, Washington, before E. E. Lescher, Notary Public in and for the State of Washington, residing at Seattle;

The Plaintiff appearing by Roy E. Jackson, Esq., representing Henry Roden, Esq., attorney for the Applicant;

The Defendant appearing by Robert V. Holland, Esq. (of Messrs. Bogle, Bogle & Gates), representing R. E. Robertson, Esq., attorney for the Defendant.

Thereupon, the following proceedings were had, and testimony given, to wit:

Mr. Holland: Let the record show that this deposition is being taken pursuant to written stipulation dated May 27, 1949, at Juneau, Alaska, signed by Mr. Henry Roden, Esq., Attorney for Applicant, represented here by Roy E. Jackson, and signed by R. E. Robertson, Esq., attorney for the Defendant, represented here by R. V. Holland, of the firm of Messrs. Bogle, Bogle and Gates.

(It was stipulated by and between the parties through their respective representatives that all objections, except as to the form of the question, or the responsiveness of the answer be reserved until the time of the hearings, and that the signature of the witness to his said deposition is waived, to which the witness himself assented.)

DR. A. BERNARD GRAY

being first duly sworn as a witness on behalf of the defendant, was examined, and testified as follows:

Direct Examination

By Mr. Holland:

Q. Will you please state your name?

A. A. Bernard Gray.

Q. Where do you practice, Doctor?

A. In the Stimson Building, Seattle.

Q. What type of practice do you follow, if any?

A. Orthopedic and Traumatic Surgery.

Q. When did you graduate from Medical School,
Doctor? A. In 1935.

(Deposition of Dr. A. Bernard Gray.)

Q. What school?

A. The University of Manitoba.

Q. What degree did you obtain at that time?

A. M. D.

Q. Have you had any medical training since that time at any institutions?

A. Yes. I was intern at the Winnipeg General Hospital. I was a resident at Deer Lodge, at Winnipeg, and at the Sea View Hospital in New York. I was attending Orthopedic Surgeon for three years at the Permanente Foundation Hospital at Oakland, California. I have been practicing my specialty in Seattle since 1945.

Q. Just briefly what were your duties at the Permanente Hospital in California, Doctor?

A. I was in the charge of the section handling fractures and injuries.

Q. Did you have a staff under you at that hospital?

A. Yes.

Q. Of what did your staff consist?

A. Assistants in the clinic, and in the wards, and in the emergency room, and also in the first aid stations in the shipyards. This hospital was established to look after 100,000 workers that worked at the Kaiser Shipyards in Northern California.

Q. How many beds in the hospital?

A. We had two hospitals, totaling approximately 400 beds.

Q. Have you had occasion to treat or examine Peter Lathourakis?

(Deposition of Dr. A. Bernard Gray.)

A. I first saw Mr. Lathourakis on July 26, 1948. He said that he was injured on July 16, 1948, when his right hand and forearm were caught between a mast and a barge. His forearm became very painful, and swollen, and discolored.

This occurred while he was fishing adjacent to the Libbyville Cannery in Alaska.

He was treated at the Koggiung Cannery the next day, where the cast was applied, and after four days he was sent back to Seattle, arriving on July 24, 1948.

His past history was normal.

Q. Just a minute. What history did you obtain from Mr. Lathourakis?

A. This is the history that he gave me. He also stated at the end of the examination, when I was reviewing the symptoms, that he was struck over the chest by the mast at the time of the injury. Since then he has had no pain, but has had difficulty swallowing heavy foods, especially meat.

Q. Did you make an examination of the man after that time, Doctor? A. Yes, I did.

Q. And what did that examination reveal, if anything?

A. Yes, I made an examination and took X-rays and ordered X-rays and treatment. The right arm was encased in a short plastic cast. X-rays taken through the cast revealed no evidence of fracture, so the cast was removed and the X-rays revealed that the bones of the forearm were intact.

I noted that the forearm was extensively swollen,

(Deposition of Dr. A. Bernard Gray.)

the circumference measuring two inches greater than the opposite forearm.

There were many areas of healing abrasions, and there was a patchy discoloration.

The swelling extended from the fingers to above the elbow.

Tenderness was extensive, which was present throughout, and it was marked. There was about 50% limitation of the motion of the fingers and wrist joint motion. There was muscle weakness.

Q. Doctor, did you observe at that time any contusion or swelling of any type on the chest of the individual?

A. No. I examined his chest wall and there was no discoloration, and there was no local tenderness.

Q. Did you make any diagnosis at that time, Doctor?

A. Yes, I made a diagnosis of extensive contusions and soft tissue hemorrhage of the right forearm of the hand.

Q. Did you give the man any treatment at that time, or following the time of your examination?

A. Yes. I applied an elastic bandage to the area, and I advised him to start using hot soaks at home and start mild massage and exercises.

I also felt that the complaint of inability to swallow meat should be investigated further, and felt that X-ray studies should be made of his esophagus.

Q. When was that complaint made, Doctor, with reference to your first examination of this man?

(Deposition of Dr. A. Bernard Gray.)

Mr. Jackson: He said that it was after the time of his examination of the arm.

Q. (By Mr. Holland): Was that made at the same time as your first examination?

A. At approximately the same time. As a matter of fact, I do not think that it was made on the same date, because after I had written my report and I was ready to sign it he came in on the second day and he told me about this, and I finished my examination.

Q. Would you describe then the course of treatment, if any, you gave to the man, and his progressive condition.

A. Yes. We had X-ray studies made of the esophagus. They revealed an organical lesion, which had the appearance of carcinoma.

I referred the patient to Dr. Julius Webber, who passed a tube down the esophagus and found an organic lesion of the walls of the esophagus.

A biopsy was taken, and the pathological diagnosis at that time was "a developmental anomaly with a question of an early adeno-carcinoma arriving in the cardiac glands of the esophagus."

I continued with the treatment of the forearm, and he improved rapidly so that by August 20 there were only residual swelling and tenderness, and there was a good range of motion of the finger joints but the grasping power of the hand was still somewhat weak.

I recommended further treatment and felt that

(Deposition of Dr. A. Bernard Gray.)

he would probably be through with the forearm by about the first of October.

Because of the clinical X-ray findings I felt that it was imperative that this man have a surgical treatment to the esophagus. I suggested that he be referred to a specialist along these lines, and finally it was arranged that he should go to the Marine Hospital.

I probably saw him a few times after that, and I didn't see him again until he came into the office months later, stating that he had been to the Marine Hospital, and he had had intensive investigation. He had a surgical procedure done, which apparently was giving him relief of the difficulty of swallowing.

Q. Doctor, did you at any time form any conclusions to the difficulty which this man was encountering with his esophagus.

A. Originally I felt that a reasonable diagnosis was carcinoma of the esophagus, and therefore it was unrelated to any injury, and that is why I recommended immediate medical care, but I had to advise that the condition was unrelated to the injury, and suggested to the man that he would have to seek care on his own.

At a later date I had an opportunity to review the findings that were made.

Q. Did you form any conclusion from your own examination of the man and from your review of any findings made?

A. Yes. After reviewing all of the findings in

(Deposition of Dr. A. Bernard Gray.)

this case and reading the opinions of a pathologist who examined him, and surgeon who treated him, I came to the conclusion that this man had a pre-existing condition in his esophagus of a congenital nature, whereby he had stomach glands present in the esophagus. These stomach glands produced acid, which the linings of the esophagus is not prepared to handle, and this is an accepted cause of inflammation of the esophagus.

I came to the opinion that the trauma of the chest had apparently no direct relationship to this injury.

This opinion is not based on any great experience that I had with diseases of the esophagus. It is based upon two facts. In the first place I cannot conceive how a trauma to the chest can affect the esophagus without severely injuring or breaking down the chest wall, or causing obvious internal injuries.

Q. At that point would you describe, Doctor, the position of the esophagus in relation to the chest wall?

A. Well, the esophagus hangs free—fairly free—in the middle of the chest wall, in front of the spine, and behind the heart, and extends from the base of the mouth or the throat down to the opening of the stomach. Hence, it extends throughout the chest.

Q. What, if any, bony structure is located in front of the esophagus?

A. It is protected in front by the sternum of the

(Deposition of Dr. A. Bernard Gray.)

ribs, and on the side by the ribs, and behind by the dorsal spine.

Q. What was the appearance of the contusion expressed in layman's language—or the contusion on this man's forearm—this man's right forearm?

A. The forearm was black and blue, and swollen.

Q. And what would you state, from your experience, is the relative sensitivity of the chest, on the one hand, and the forearm, on the other, to a blow of the nature described by Mr. Lathourakis in his history?

A. Well, if the blow to the chest was as severe as the blow to the forearm, the symptoms in the chest would have been greater. It is a question that is difficult to answer scientifically.

Q. You stated, I believe, Doctor, that X-rays were taken of the chest. Were they taken by you?

A. No. No X-rays were taken of the chest. There was no indication to take X-rays of the chest. There was no local signs of injury or tenderness. X-rays were ordered of the esophagus.

Q. Now, did you have something further to say, or did I interrupt you in your diagnosis and opinion?

A. Yes. I made an opinion, as I felt that I was entitled to make an opinion despite the fact that I am not a specialist in the diseases of the esophagus. I based my opinion mainly on two things.

In the first place, I have seen innumerable injuries to the chest, and I have never seen a complication involving the esophagus.

(Deposition of Dr. A. Bernard Gray.)

In the second place, there was no objective evidence when I examined him ten days after the injury, of any injury to the chest wall.

And, thirdly, the fact that the pathological diagnosis indicated a pre-existing condition; and I offer that opinion for what it is worth.

Q. Doctor, assuming that the condition in the esophagus had not existed, and that your opinion on this question would be related only to the condition of the man's forearm and the contusion at that point, under that assumption, when was the man able to return to work?

A. Well, I felt that he would have been fit to return to work approximately October 1, 1948, although I didn't see him for at least four weeks prior to that time.

Q. In other words——

A. (Interposing): I felt that the period of disability was reasonable, and I would expect, barring any other complications, full return of the function in that time.

Q. And as of that time, did you find a permanent disability in regard only—that is, only to his arm?

A. Well, at the time that I examined him, which was approximately five weeks prior to October 1, I found that the swelling had subsided considerably. There was some residual swelling. And, that he had a good range of motion, but the grasping power of his hand was still weak.

(Deposition of Dr. A. Bernard Gray.)

Mr. Holland: I do not have any more questions.

Cross-Examination

By Mr. Jackson:

Q. Doctor, after the time Mr. Lathourakis came to you, did he tell you, or did you go into details as to how this accident occurred?

A. Yes. I found it a little bit difficult to understand Mr. Lathourakis, as shown by my notes, but there was obviously an accident, and my description there was rather brief because it involved the mention of a boat and a barge and a mast, and I found a difficulty—I know that his hand was jammed between the barge and the mast, and he said that the front of his chest was struck by the mast.

Q. Did he tell you, Doctor, as to how fast the boat was going that he was in that hit the barge?

A. No. I do not have any recollection of those details. I know that this certain type of injury occurred, and I do recall very definitely that it is a little hard for me to visualize it.

Q. And he was a little hard to understand?

A. Yes, he was a little hard to understand.

Q. And did he tell you that following this accident that he was paralyzed from the neck down to, the bottom of his stomach?

A. No.

Q. You did not check that?

A. No.

Q. Did he also tell you that immediately following the accident he had vomited?

A. No, I have no record of that.

(Deposition of Dr. A. Bernard Gray.)

Q. When you speak of regurgitation, Doctor, what is that? To a layman is that vomiting?

A. Food coming up from the stomach. It might be true vomiting, or the food might just reach the mouth and be swallowed again. That is usually what is meant by regurgitation.

Q. And did you get any history from Mr. Lathourakis that after this accident he was taken up to the hospital there at Koggiung and that he tried to take a cup of coffee and that it regurgitated or came up?

A. No. I do not have any history of that. My history of his difficulty in swallowing was obtained I think after the time of the second visit as an incidental finding, and there was a subjective evidence, and I just followed it straight through and left it in the hands of a specialist.

Q. Did he tell you that this swallowing difficulty—difficulty in swallowing solid food, such as meat, that you speak of, that that came on immediately following this accident?

A. No. The way that he put it was this. He said that he could not swallow meat, or that he could not eat meat. In fact, he was not particularly impressed—he did not worry much about that, but he just said that he could not eat meat, and I asked him about that and he said that he could not get it down. And he also told me of course then at a later date, that he had never had that before the injury.

Q. Did he tell you that he had always been in

(Deposition of Dr. A. Bernard Gray.)

the best of health prior to the time that this accident occurred?

A. Yes. His past medical history as far as I can determine, was absolutely negative. He had always been well.

Q. Well, now, Doctor, assuming this, and I would like to ask you this, assuming the fact that he was paralyzed from the neck down to the bottom of his stomach following this accident, I would like to ask you whether or not if that was true, whether this accident would have caused that condition?

A. Whether it is true or not, I do not feel—or let me put it this way, to my own knowledge I have no way where I can say that that accident, or a blow on the chest could have caused this lesion in the esophagus.

Q. My question was whether or not the paralysis that he had immediately following this accident was due to the accident, where he was numb and paralyzed from his neck down to the bottom of his stomach?

A. I have no history of any paralysis. I do not see how the injury could have caused a paralysis unless it would affect his spinal cord. He had no evidence, of course, of any paralysis ten days following the injury—eight days following the injury—when he arrived in Seattle. So I do not see how that injury could have caused a paralysis below the neck.

Q. Well, let me ask you this, assuming that he

(Deposition of Dr. A. Bernard Gray.)

had that as he tells us—that he was numb and paralyzed from the neck down to the bottom of his stomach, would it be reasonable to assume that that condition was the result of this accident that he had? Just answer the question.

Mr. Holland: I think that the Doctor has answered that question.

Mr. Jackson: No, he has not.

A. Yes. I can visualize anatomically or physiologically no condition that would cause local paralysis between the neck and the stomach. So on that basis I cannot answer that question.

Q. Now, Doctor, did he tell you that he was scared to death when this boat struck his barge and he was pinned and struck the way that he was?

A. I have no record of that.

Q. Doctor, do you recognize that fright has an effect on an individual's anatomy where there is a question of life and death involved?

A. Fright has an effect on individuals physiologically. Fright does not change the structure but fright certainly affects the man in innumerable ways as you well know.

Q. Well, assuming this, this man being on this boat—a fishing boat—being towed at 25 miles an hour, and hitting this barge head on, and he was standing in the bow of the boat, and it was a question of what he was going to do to save his life, a person in that fright, I would like to ask you if that fright would be a factor, you might say, in causing

(Deposition of Dr. A. Bernard Gray.)

a disturbance in his stomach and in his heart and in his esophagus and in other organs of his body.

Mr. Holland: I think that that is certainly immaterial as to the other organs of his body other than his esophagus.

A. Oh, yes. It certainly could cause a disturbance in function.

Q. And it would also cause a disturbance of function in the esophagus. A. Yes, sir.

Q. Now, Doctor, I would like to ask you, assuming that he regurgitated and vomited following this accident, would it be reasonable to assume that a man having an accident such as he did, would vomit and regurgitate? A. Yes.

Q. And if he had this fright that he had spoken about, and he had this regurgitation, would not that fright and regurgitation also affect his esophagus?

A. The effect on the esophagus would be the regurgitation.

Q. Now you have stated here that the findings that were made from X-rays and pathological reports indicated that he had what you called an abnormality of the esophagus? A. Yes.

Q. Is that correct? A. Yes.

Q. In other words his esophagus is a little different than that of a person who has a normal esophagus? A. That is right.

Q. That is correct? A. Yes, sir.

Q. Fright and regurgitation may cause a much different reaction in the esophagus where you have

(Deposition of Dr. A. Bernard Gray.)

an abnormal esophagus than where you have a normal esophagus? A. Yes, that could be.

Q. And, Doctor, this fright and regurgitation of the esophagus, or the regurgitation which affects the esophagus, does that cause a spasm to exist in the esophagus? A. Yes, it can.

Q. And when you speak of a spasm of that nature in the esophagus what occurs, putting it in a layman's language?

A. Certain muscles tighten up and tend to restrict.

Q. And does that condition, Doctor, impair swallowing. A. Yes.

Q. You have had occasion to see that during the course of your practice, have you?

A. Yes. As long as the spasm exists, it will impair swallowing.

Q. Well, now, I would like to ask you, based on the history that Mr. Lathourakis has given, and which has been submitted by Mr. Lathourakis, that this difficulty in swallowing occurred immediately following the accident?

Mr. Holland (Interposing): Just a minute. That is not the history that the doctor gave that he obtained from Lathourakis.

Mr. Jackson: All right.

Q. (By Mr. Jackson): I am asking you, Doctor, to assume then that as the history of Mr. Lathourakis has given it——

(Deposition of Dr. A. Bernard Gray.)

Mr. Holland (Interposing): To whom?

Mr. Jackson: As he has first given it to the Board in Alaska in an affidavit which he has prepared——

Mr. Holland (Interposing): All right.

Mr. Jackson (Continuing): And the story that he has already related to the Industrial Board at Juneau, Alaska.

Q. (By Mr. Jackson): Assuming that immediately following this accident he had this numbness or what he describes as paralysis or lack of feeling in the chest or esophagus; that he regurgitated or vomited immediately following the accident, and that he was frightened, as he puts it, to death at the time of the accident, and that this impairment of swallowing came on immediately following the accident; that he tried to drink some—I think he tried to drink some coffee, and he tried to drink some gin to get some relief and regurgitated both the coffee and the gin following this accident, which has also been attested to by his partner—I would like to ask you whether you would have an opinion as to whether or not this lack of swallowing at that time would be due to the fright and regurgitation which followed this accident?

A. I think it is reasonable to assume that it could be.

Q. Did you go into the question at all with him as to when this impairment of swallowing or difficulty in swallowing meat, we will put it, that you got from him—when that occurred?

(Deposition of Dr. A. Bernard Gray.)

A. No, except that it occurred since the injury, and he hadn't had it before.

Q. And he hadn't had it before?

A. That is right.

Q. And you didn't go into what had occurred there in the hospital?

A. No, I didn't go into any of the details.

Q. But that condition was existing at the time when he came to you?

A. When I saw him ten days after the injury he had difficulty in swallowing, and that was corroborated by X-rays. And the evidence showed an organic lesion of the esophagus. And because of that I felt that my function as attending physician had to end at that point as far as the esophagus was concerned.

Q. Well, what happened was this, isn't this correct, that you sent him up to Dr. Hartzell?

A. Yes, sir.

Q. And Dr. Hartzell made a report to you that he found some evidence of a stricture in the esophagus.

A. Dr. Hartzell's conclusion was that there was evidence of an organic defect of the esophagus. It was not a spasm. There was apparently some growth that obstructed it.

Q. And you told Mr. Lathourakis that you felt that it was cancer?

A. No, I arranged for Mr. Lathourakis to have an examination of the esophagus, with a biopsy made, and after that I told him that it was my

(Deposition of Dr. A. Bernard Gray.)

opinion that he had a carcinoma, and unless we could prove otherwise, that he needed immediate treatment.

Q. I mean, during the course of events—during this period you were convinced, after Dr. Hartzell's X-rays and Dr. Webber's biopsy, that in all probability this proved to be cancer.

A. I didn't tell him directly that it was cancer, because I was not in a position to tell him so. I told him that the possibility was—in fact, I told him very little, but I told his friends and family that that was the probable diagnosis, and that he had to have something done immediately.

Q. And that is what you urged him and his friends to have him do,—was to go to have this operation?

A. No. I urged him to see a specialist in those lines, to have whatever treatment was necessary, and I felt sure that it would probably be surgical; that it might be cancer.

Q. Then after he had gone to the Marine Hospital and been examined there, you had a report from there as to what their opinion was too, is that correct?

A. The report that I had from the Marine Hospital officially was after his surgery.

Q. I see.

A. But in the meantime I talked to them—in fact, I talked to Dr. McGowan in and between the time that the man had left the Marine Hospital, and Dr. McGowan felt that he had to have surgery.

(Deposition of Dr. A. Bernard Gray.)

In fact, their initial diagnosis was a carcinoma of the esophagus.

Q. That is what they determined also up there, that he had cancer of the esophagus?

A. On the first examination.

Q. Yes?

A. But not after they concluded the case.

Q. That is, not after they made the operation?

A. That is right.

Q. And immediately after the operation they found that there was no cancer? A. Yes, sir.

Q. That is correct, is it? A. Yes, sir.

Q. Now, Doctor, as I understand you made no examination of the arm condition and, as I understand it, the last examination you made of the arm was made about Sept. 1, 1948? A. About.

Q. About? A. Yes, sir, approximately.

Q. So you made no determination on October 1st, or at any other time as to whether or not there was partial disability in the arm?

A. No, that was just a reasonable assumption based upon his progress.

Q. And the operation was recommended in this case, Doctor, for the purpose of improving or eliminating this complaint of not being able to swallow?

A. It was to relieve his obstruction?

Q. That is what they recommended the operation for? A. Yes, sir.

Q. And it was hoped that this operation would eliminate the difficulty of swallowing food that he

(Deposition of Dr. A. Bernard Gray.)

had complained about that had followed this accident?

A. That it would relieve the obstruction.

Mr. Holland: You are referring now to what was hoped and what was concluded by the doctor who performed the operation, and not the witness.

Q. (By Mr. Jackson): Well, this man came in, and one of the reasons or the principal reasons why this study of this esophagus was made was because of his complaint of inability to swallow?

A. Difficulty in swallowing, yes, sir.

Q. That is correct? A. Yes, sir.

Q. And the operation was in order to relieve that?

A. Well, yes, I mean, there are two factors. In order to relieve that, and also with the presumptive diagnosis of carcinoma you know that the man is going to die if some attempt is not made to treat the carcinoma.

Q. I would like to ask you to assume this, Doctor, assuming these symptoms that I have stated Mr. Lathourakis has stated to the Alaska Industrial Board that followed this accident, isn't it reasonable to assume that if these symptoms are true, as I have heretofore stated them, that followed the accident—that is, the fright, the regurgitation, the numbness that he felt in the chest to down in his stomach, and then the lack of ability to swallow, and then—if it is not reasonable to assume that all those symptoms that followed this accident and persisted to restrict the swallowing, up to the time of

(Deposition of Dr. A. Bernard Gray.)

the operation—if it is not reasonable to assume that those symptoms are the result of the accident?

A. The symptoms are the result of whatever the basic cause of the condition is. If the basic cause of the condition is a thickened organic stricture of the esophagus it is impossible for me to state that that condition is due to the injury. If the symptoms are due to spasm alone, then I feel that it is reasonable to assume with that definite history that this symptom of difficulty of swallowing is due to the injury.

Q. Well, then——

A. (Interposing) But from a medical standpoint and from my knowledge of what has transpired and what the findings were, I feel of course that he obviously had a pre-existing condition. So I cannot lay all of the symptoms due to the injury.

Q. All right. What I am primarily interested in is this, this spasm would follow fright and an injury to the chest, such as he had, and under the conditions that he had? A. It could.

Q. And such a spasm could affect, as you once said, the esophagus?

A. Well, the spasm is the effect on the esophagus.

Q. All right. And, also, the spasm would naturally affect this thickening of the esophagus?

A. I do not know how it could affect the thickening. You see, a person can swallow with a partial obstruction of the esophagus, and probably not know it, and a spasm which perhaps in a normal

(Deposition of Dr. A. Bernard Gray.)

man would not cause a temporary obstruction, would cause in a man with an abnormal esophagus a temporary obstruction. And then, obviously, he is able to eat, because all that he could not eat was meat. That is, solid chunks of food as his condition progressed.

Q. Doctor, the record shows here, and it has been submitted to the Board, that during the time that he was here he developed a condition in the esophagus where he could not swallow anything?

A. It became progressively worse, yes.

Q. And is that a spasm that results in the esophagus when they cannot swallow anything?

A. No. It is a real obstruction. It is something growing in the walls of the esophagus as to narrow it and obstruct it.

Q. The record shows that he was able to swallow soft foods, but as he told me, and I would like to have you assume that in this question—the information that he furnished was that he had——

Mr. Holland: (Interposing) Now, I think that you should ask this doctor a hypothetical question, if you want to phrase it that way. I do not believe you can testify in this way.

Q. (By Mr. Jackson): Assuming, Doctor, that he was able to eat soft foods during the time that he was under your treatment, and then after he learned that you had told his friends—learned through his friends that you had told them that he should go and have this operation because he had cancer—and that if he didn't have this operation he

(Deposition of Dr. A. Bernard Gray.)

was going to die, and immediately following that——

A. (Interposing) I told him of that possibility.

Q. Now, just assume that. Assume that he got that information immediately, and following that, as he did, he became angry and he could not swallow anything—could not even swallow water—then he had to go to a doctor, and after a couple of days' treatment, why he was relieved of that condition, would that be a spasm—a condition of that kind, would that be a spasm of the esophagus?

A. It might be a superimposed spasm under those conditions.

Q. And, Doctor, I assume that in the course of your practice you have never had the opportunity of seeing the results of an accident such as has been described here, and a spasm following that that has affected an abnormal esophagus that you speak of?

A. No, I never had that experience. I would like to make that clear too. I mean I want to make it clear, that I am not a specialist in the diseases of the esophagus, but in traumatic surgery.

Q. Yes, Doctor. Now, Doctor, I would just like to ask you a few more questions, and then I am through. You, I believe, testified in the case of Mr. Landro, that you examined all of the people going to Alaska for Libby, McNeill & Libby?

A. Most of them.

Q. And then you treat and see all of the accident cases of Libby's?

(Deposition of Dr. A. Bernard Gray.)

A. I try to see them all. I do not treat them all. I refer some of them for treatment. I refer some to their home town doctors for treatment. Those I feel confident to treat in Seattle, I treat.

Q. And you do that work, I believe you stated, on a fee basis instead of a retainer basis?

A. On a fee basis.

Q. And you are called upon by Bogle, Bogle & Gates to make examinations from time to time?

A. Yes, sir.

Q. Of cases? A. Yes, sir.

Q. Is that correct? A. Yes, sir.

Mr. Jackson: I think that is all.

Redirect Examination

By Mr. Holland:

Q. Doctor, did you see anything further of Lathourakis after the time you referred him to an expert?

A. I think that he came in several times and we treated him by diathermy, and encourage him in the use of exercise, and massage.

Q. This is with reference to his arm?

A. This is with reference to his arm. The only thing that I did insofar as the condition in his esophagus was concerned was to make an attempt to see that he got treatment.

Q. And you did not make the decision that an operation was to be done, or direct that it be done?

A. No, not at all.

(Deposition of Dr. A. Bernard Gray.)

Q. That is, you just didn't do that?

A. No, sir.

Q. Doctor, isn't it true that fright of a kind that possibly has been described by Mr. Jackson would affect a normal individual such as he would obtain a spasm in his esophagus in the same manner, if the fright was of sufficient magnitude?

A. Well, in my experience spasm of the esophagus occurs more from chronic fright than acute fright. It is distinctly a symptom of nervousness, and there is a well established condition called cardio spasm, which is a spasm of the lower end of the esophagus, which prevents people from swallowing, and which is physiological in origin and, as I say, is due to chronic fright rather than acute fright.

Q. Doctor, would that kind of a spasm, or the kind that you have testified to possibly have resulted from the fright in this instance—would those kinds of spasms cause or damage the strictures or damage the lesions in the esophagus?

A. Not that I know of or ever heard of.

Mr. Holland: Those are all the questions that I have.

Mr. Jackson: I would just like to ask you this question, Doctor. Could the spasm of the esophagus, together with the regurgitation that followed in the esophagus in Mr. Lathourakis's case, aggravate an organic lesion in the esophagus.

A. I think it could.

(Deposition of Dr. A. Bernard Gray.)

Mr. Jackson: That is all.

Mr. Holland: Do you agree, Mr. Jackson, to the waiving of the witness's signature to his deposition?

Mr. Jackson: I do.

Mr. Holland: And is that agreeable with you, Doctor, that you waive your signature to your deposition?

The Witness: Yes, I do.

Mr. Holland: That is all.

(Witness excused.)

(Deposition concluded.)

State of Washington,
County of King—ss.

I Hereby Certify that on the 22nd day of June, 1949, before me, E. E. Lescher, a Notary Public in and for the State of Washington, at 602 Central Building, Seattle, King County, Washington, personally appeared pursuant to stipulation by the Applicant and the Defendant through their respective attorneys, beginning at the hour of 1:00 p.m., Dr. A. Bernard Gray, called as a witness on behalf of the Defendant in the above-entitled matter; and

Roy E. Jackson, Esq. appearing on behalf of the Applicant, represented by Henry Roden, Esq., his attorney.

Robert V. Holland, Esq., (of Messrs. Bogle, Bogle & Gates) appearing on behalf of the Defendant, representing R. E. Robertson, Esq., its attorney;

The above-named witness, being by me first duly sworn to tell the truth, the whole truth and nothing but the truth, and being carefully examined, deposed and said as in the foregoing transcript of deposition set out.

I Further Certify that the said deposition has been reduced to typewriting under my personal direction, by a competent person, and that the deposition is a correct transcript of the testimony as given by the witness, and that the same has been retained by me for the purpose for sealing up and directing the same to the Clerk of the Board, as required by law.

I Further Certify that the reading over by or to the said witness of the said deposition, and the transcription of the said witness to his said deposition, were by the parties hereto, and the witness himself, expressly waived.

I Further Certify that I am not of counsel or attorney to either or any of the parties, nor am I interested in the event of the cause.

Witness my hand and official seal at Seattle, Washington, this first day of July, 1949.

/s/ E. E. LESCHER,

Notary Public in and for the State of Washington,
residing at Seattle.

STIPULATION

It is hereby stipulated by and between the applicant through his attorneys, Henry Roden, Esq., and Roy Jackson, Esq., and defendant, Libby, McNeill & Libby, a corporation, through its attorneys, R. E. Robertson and Bogle, Bogle & Gates, that the records of the Peninsula Packers show that the applicant, Peter Lathourakis, was employed by Peninsula Packers during the 1949 Bristol Bay salmon fishing season as a gill net fisherman at Ugashik, Alaska as a fishing partner of Chris Coulas, who was the boat captain; that for said season the said applicant and his fishing partner, Chris Coulas, caught 8,400 fish. That said applicant was paid by Peninsula Packers the sum of \$1328.67 plus \$200.00 run money, or the sum of \$1528.67.

It is further stipulated that this testimony shall be considered by the Alaska Industrial Board as evidence on behalf of defendant.

Dated at Seattle, Washington, August 13, 1949.

/s/ HENRY RODEN,

/s/ ROY E. JACKSON,

Attorneys for Applicant.

BOGLE, BOGLE & GATES,

/s/ R. E. ROBERTSON,

Attorneys for Defendant.

Received Aug. 8, 1949.

MINUTE ORDER OF JANUARY 18, 1950

Journal No. 19, Page 360

These cases came before the court for hearing on plaintiff's appeal from the decision of the Industrial Board. R. E. Robertson appeared for plaintiff and Henry Roden appeared in behalf of the claimants. Mr. Robertson argued plaintiff's case at great length, closing the same at 5:10 p.m.

LETTER RE PETER LATHOURAKIS

Drs. Slyfield & Nelson,
Diseases of the Heart and Lungs,
Medical and Dental Building,
Seattle 1.

February 23, 1949

City Office Of Laurel Beach Sanatorium

Dr. Frederick Slyfield,
Dr. John E. Nelson,
Dr. Averly M. Nelson.

Mr. Roy E. Jackson,
Attorney at Law,
1207 American Building,
Seattle 4, Washington.

Re: Peter Lathourakis

Dear Mr. Jackson:

According to your request Mr. Lathourakis appeared at my office February 17, 1949.

The claimant confirms the story contained in the

information submitted by you, to the effect that he received a crushing blow on the chest on a sailing fish boat on July 16, 1948. According to claimant's statement he foresaw the catastrophe approaching and braced himself by putting his arms around the mast. His vessel struck a scow with terrific force which was transmitted to his chest and right arm. The accident was promptly followed by swelling and exudation of blood into the tissues to such extent that the right arm and the chest were "black and blue" and swollen, and the arm was numb. Two days after the injury he had difficulty in swallowing solid food. He had the impression that food stopped in the top of the esophagus. An occasion arose early in October when for three days he was unable to swallow anything, even water.

Several medical men saw the case and there was grave suspicion of cancer of the esophagus. However, the situation was finally determined by surgery at the Marine Hospital where, on October 11, 1948, the thorax was opened. The wall of the esophagus was found to be two to three times the normal thickness, the thickening extending from the arch of the aorta to the entrance to the stomach. A small hiatus hernia of the stomach was also found. A piece of tissue was taken from the thickened wall for preparation for microscopic examination. This section revealed displaced mucosa with gastric glands in the esophagus, and chronic esophagitis. Esophagogastrostomy of Mikulicz type was performed at the same operation.

Although the function is not entirely normal, swallowing is much more comfortable than previously. He complains now of pain in the left thorax and shortness of breath on walking. These two symptoms are presumably the result of the necessary surgery.

Examination

Claimant is a white male (Greek) 60 years old. He is five feet nine inches tall and weighs 156 pounds. He states his customary weight is 180 pounds. He looks fairly well and does not appear to be in any distress. The blood pressure is 130/86. The blood sedimentation rate is 6 mm. in 60 minutes, which is normal. The vital capacity is 3 liters which equals 68% of normal. The urine is normal.

A long scar is seen on the back of the left thorax which represents the large incision necessitated by the peculiar nature of the case. There is slight restriction of expansion of the left side of the thorax. Auscultation reveals only diminished breath sounds, particularly in the left base.

The X-ray film shows the lung fields to be clear except for the lower part of the left lung field which is retracted and hazy and the left diaphragm is elevated. This is presumably due to the surgery and is the major explanation for the shortness of breath as obviously a considerable portion of the left lung is not expanding normally in respiration. The flouroscope shows there is still some constriction in the upper esophagus and a widening in the lower

part. The barium goes through to the stomach, but more slowly than normally.

From my study of the case the finding of markedly thickened esophageal wall appears acceptable and the misfortune has been definitely improved by surgery. Because of probable cicatrization resulting from surgery it is as yet rather early to prognosticate the end result.

As to the cause of this misfortune many etiological factors might be conjectured. One cannot avoid being seriously influenced by the history. Mr. Lathourakis had no complaints up to the moment of the accident, yet immediately after it the train of symptoms arose which clearly led to the disaster on which claimant bases his complaint. I do not assert proficiency in disturbances of the esophagus, but the story, the findings at the operation, the pathological report and the present condition are, to me, convincing evidence that the accident was responsible for the chain of events.

Respectfully submitted,

/s/ FREDERICK SLYFIELD, M. D.

LETTER RE PETER LATHOURAKIS

Lowell E. Williams, M. D.,
1004 4th & Pike Bldg.,
Tel. Eliot 1243,
Seattle 1, Wash.

March 23, 1949.

Roy E. Jackson, Attorney at Law,
American Building,
Seattle, Wash.,

Re: Peter Lathourakis.

Dear Mr. Jackson:

Mr. Lathourakis was re-examined at your request March 22, 1949, to determine disability resulting from his accident of July 16, 1948, at which time he sustained injury to the chest and right forearm, a crushing injury to the latter.

He had an esophagogastrostomy performed October 11, 1948, the approach being through the left side of the chest. This was done for an esophageal lesion which, according to the man's history, began to be evident within 24 hours following the accident, and was characterized by obstruction to swallowing food; later, even liquids. He states that he had never previously had similar difficulty. The pathological report on sections of tissue from the involved area of the esophagus indicate an inflammatory reaction.

His complaints at this time are shortness of breath on slight exertion, such as walking two or

three blocks, pain in the lower left chest with cough. He has to eat small meals four or five times daily, as a larger quantity of food in the stomach causes pain in the left shoulder. He states that he has no power in gripping with the right hand (he is right-handed), and that there is numbness of the index and middle fingers, occurring intermittently.

Examination shows that he has lost about 45 pounds since the operation, and has regained about 20 pounds in the past two month. There is limitation of motion of the left rib cage, and under the flouroscope the left diaphragm is elevated and the lower lobe of the lung appears partly collapsed. Heart and blood pressure are normal.

Grip in the right hand is decreased to approximately 40% of that of the left hand. The numbness of the fingers of which he complains can be explained by medial and radial nerve damage in the forearm.

The man in his actions and appearance gives an impression of general weakness. This has been produced by the effects of the accidental injuries and by the strain and shock of the operation.

In my opinion the history of the accident and the man's history together with the x-ray and pathological evidence and the findings at operation, indicate convincingly that the accident was the responsible cause for the esophageal injury, probably by bruising of the esophagus by the mediastinal contents as a result of impact.

He has suffered permanent disability as a result

of the injuries sustained in his accident of July 16, 1948. The disability resulting from the chest injury and subsequent necessary surgical work is estimated at 65% of the maximum for unspecified permanent partial disability, and that to the major forearm at 20% of the amputation value of the major upper extremity at the elbow.

It is expected that some strength of grip will be regained in the forearm with increased use and that some improvement of the present state of general weakness will ensue. This is taken into consideration in the above ratings. Otherwise, I feel that his condition is fixed at this time.

The man has been totally disabled for work since the date of injury, and is still disabled for any but the lightest work.

Very truly yours,

/s/ L. E. WILLIAMS, M.D.

OPINION

R. E. ROBERTSON,
Attorney for plaintiff.

J. GERALD WILLIAMS,
Attorney General of Alaska,

JOHN DIMOND,
Assistant Attorney General of Alaska,
For Alaska Industrial Board,

HENRY RODEN,
For Peter Lathourakis.

This is a proceeding to set aside an award of the Alaska Industrial Board to the defendant Lathourakis for temporary and partial permanent disability.

On July 16, 1948, Lathourakis was injured in a collision between his fishing boat and a scow, sustaining severe injuries to his chest and arm. Upon being extricated from the position in which he had been pinned, he took a drink of gin, but vomited. Thereafter, he was unable to swallow solid food, was hospitalized and on July 23rd flown to Seattle for further treatment. The examination made there indicated cancer of the esophagus. On October 11, 1948, an operation was performed which involved the removal of a rib and the opening of the chest, a lung was collapsed, the diaphragm was split, the position of the stomach was changed by elevating it up to the middle third of the esophagus and the two were sewn together. The diaphragm was then sewn to the side of the stomach and the stomach itself to the vertebral column and the chest wall.

On September 28, 1949, the Board allowed Lathourakis \$3833.15 for temporary disability to May 20, 1949. The Board also found that his permanent disability consisted of residual weakness in his right hand, lack of stamina and endurance, shortness of breath and difficulty in performing any manual labor due to the restricted diet necessitated by the condition of his esophagus and awarded him \$3600 for 50% permanent disability.

The plaintiff contends:

(1) That there was no competent evidence of temporary disability to May 20, 1949, or of permanent disability.

(2) That permanent disability, if any, resulted from the operation necessitated by a condition of the esophagus which was congenital and, hence, wholly unrelated to the injuries; and

(3) That fairly construed, the statute does not authorize the cumulation of allowances for temporary and permanent disability.

The first contention is based on the fact that the expert medical evidence submitted on behalf of the defendant Lathourakis consisted of unsworn affidavits, inadmissible as hearsay and directly contradicted by the plaintiff's medical testimony. Undoubtedly an award based solely on hearsay cannot stand and so the next inquiry is whether the remaining evidence consisting of the testimony of the defendant Lathourakis and his witnesses is sufficient

to sustain the findings of the Board as to temporary and permanent disability. Plaintiff contends, so far as permanent disability is concerned, that it is insufficient under the rule that lay witnesses are incompetent to testify to the cause of disability. It may be that neither the defendant Lathourakis nor his witness is competent to testify that the condition of the esophagus or its aggravation resulted directly from the injury, but the testimony of the defendant himself, as to his condition before, immediately after and since the injuries were sustained, is competent, and from this, in connection with evidence reciting the sequence of events, the Board was authorized to infer—expert testimony to the contrary notwithstanding—that there was a causal relation between the injuries and the condition of the esophagus, regardless of whether the condition was congenital and, therefore, merely aggravated, or the esophagus was directly injured. The evidence in this case would appear to clearly sustain plaintiff's view that there was no such causal connection, but the Court is not permitted to weigh the evidence, nor may it, because the evidence is susceptible of contrary or other inferences, usurp the fact finding prerogative of the Board. *Contractor v. Pillsbury*, 150 F.(2) 310 (9 Circ.); *Western & Atlantic Railroad Company v. Gardner*, 40 S.E. (2nd) 672, 675 (Georgia); *Ballenger v. Southern Worsted Corporation*, 40 S.E. (2nd) 681, 682 (S.C.); and any doubt must be resolved in the claimant's favor. *Liberty Mutual Insurance Company v. Hoage*, 65 F. (2) 822, 824. So far as the period of

temporary disability is concerned, while the evidence is far from satisfactory, the Court cannot say that it is insufficient.

The remaining contention that allowances for temporary and permanent disability may not be cumulated, is based upon an analysis and reconstruction of the Workmen's Compensation Statute, Sections 43-3-1-39 ACLA, 1949, which though plausible, appears to rest largely on conjecture and speculation as to legislative intent. It may be granted that the language of the act is somewhat inapt, ambiguous and inconsistent and that it encourages malingering for the purpose of prolonging temporary disability payments, but in my opinion it is not reasonably susceptible of the construction urged by plaintiff, and in any event, doubts must be resolved in favor of the employee.

Plaintiff also urges that in determining defendant's earning capacity, the Board erroneously added \$1500, representing the amount that the defendant testified he had earned in self-employment during the first four months in 1948 and which he could have earned in the employ of another had he not chosen to work on his own fishing boat, to \$5300, the amount of his earnings in 1947. On behalf of the defendant, it is argued that this item of \$1500 represents the exemptions allowed under the Federal Income Tax Law for 3 dependents. An examination of the evidence, however, wholly fails to sustain defendant's contention and, hence, the Court is of the opinion that the Board misapplied the law in adding the value of the defendant's services in self-employ-

ment outside of the year 1947 to the earnings for that year, especially since his earnings for that year appear to be typical.

Plaintiff also contends that there should be deducted from the award for temporary disability, the sum of \$1724.08 paid to the defendant under a provision of the contract of employment apparently requiring payment of wages or earnings for the remainder of the fishing season regardless of any disability incurred in the meantime. But since the contract was not introduced in evidence by the plaintiff, the Court cannot find that defendant's right to receive the remainder of his pay did not accrue on the date of his injury. Indeed, in the absence of such evidence, the Court cannot consider this point.

It also appears that as a result of errors in computation, \$1050.80 paid previously to the award was not deducted and the period of temporary disability was computed at 315 instead of 307 days. Since these are mere mathematical errors which the parties indicated would be corrected, it is unnecessary to discuss them.

It is the opinion of the Court that the award should be modified as pointed out and that as so modified, it should be affirmed.

GEORGE W. FOLTA,
District Judge.

Filed February 9, 1950.

[Endorsed]: Filed February 15, 1950.

JUDGMENT

This cause came on regularly for hearing before the Court on appeal by plaintiff from a decision and award made and rendered by the Alaska Industrial Board on September 28, 1949, in a proceeding then pending before said Board wherein and whereby it awarded to the defendant Peter Lathourakis the sum of \$3833.55 as temporary disability compensation, covering a period of 315 days at the rate of \$12.17 per day, and the sum of \$3600.00 as partial permanent disability, for injuries sustained by said defendant Lathourakis arising out of and in the course of his employment by plaintiff.

Upon consideration of the evidence submitted and the argument of counsel for the respective parties, the Court finds there is sufficient evidence to sustain the findings and award of said Board and save and except in the following particulars, to wit:

(a) Said Board erred in computing the average daily earnings of said Lathourakis, which the Court now finds to have been the sum of \$14.52 and 65% thereof amounts to the sum of \$9.43;

(b) Said Board erred in computing the number of days during which said Lathourakis was temporarily disabled which the Court finds to have been 307 and no more; and that to the extent herein set forth said award should be and the same is hereby modified.

Wherefore, premises considered: It Is Ordered, Adjudged and Decreed that said defendant Peter Lathourakis do have and recover of and from the

plaintiff total temporary disability compensation of \$2005.00 [being \$9.43 (65% of average daily wage of \$14.52) for 307 days, together with interest at the rate of eight per cent per annum computed on the basis of monthly payments of \$282.90 (30x\$9.43) from November 8, 1948, the date on which such first monthly payment became due, which interest amounts to \$159.99, less \$1050.00 heretofore paid by plaintiff the defendant Lathourakis on account of said total temporary disability compensation]; and

It Is Further Ordered, Adjudged and Decreed that the defendant Lathourakis do have and recover from the plaintiff the sum of \$3600.00 as compensation for 50% permanent disability sustained by him while employed by plaintiff and in the course of his employment, together with interest thereon at the rate of eight per cent per annum from September 28, 1949, until paid, together with his costs and disbursements herein, including an attorney's fee of \$350.00.

Done in open court at Juneau, Alaska, this 24th day of March, 1950.

/s/ GEORGE W. FOLTA,
District Judge.

Entered Court Journal Page 408, No. 19.

[Endorsed]: Filed March 24, 1950.

NOTICE OF APPEAL

Notice Is Hereby Given that the plaintiff appeals to the United States Court of Appeals for the Ninth Circuit from that certain Final Judgment entered in the above-entitled cause on March 24, 1950.

Dated at Juneau, Alaska, this 28th day of March, 1950.

/s/ R. E. ROBERTSON,
Attorney for Plaintiff.

Copy received March 31, 1950.

/s/ HENRY RODEN,
Attorney for
Defendant Lathourakis.

[Endorsed]: Filed April 3, 1950.

SUPERSEDEAS ON APPEAL

Whereas, Libby, McNeill & Libby, the plaintiff corporation in the above action, has appealed to the United States Court of Appeals for the Ninth Circuit from that certain judgment rendered against it in the above action by the District Court for the Territory of Alaska, First Judicial Division, on March 24, 1950, in favor of the defendant Peter Lathourakis for total temporary disability compensation of \$2,005.00 under the Workmen's Compensation Law of Alaska, and also for 50%

permanent disability compensation of \$3,600.00 under said law, together with interest thereon at the rate of 8% per annum from September 28, 1949, until paid, together with said defendant Lathourakis' costs and disbursements, including an attorney's fee of \$350.00; and

Whereas said plaintiff is desirous of staying the execution of said judgment so appealed from, and the defendants have agreed that the penal amount of the supersedeas shall be \$5,000.00.

Now, Therefore, in consideration of the premises and such appeal, we, Libby, McNeill & Libby, plaintiff corporation, as Principal, and the Maryland Casualty Company, a corporation organized and existing under the laws of the State of Maryland and engaged in and authorized to engage in business in the Territory of Alaska, as Surety, do hereby jointly and severally undertake and promise, and acknowledge ourselves bound in the sum of \$5,000.00 that the plaintiff corporation Libby, McNeill & Libby will satisfy said judgment in full, together with all costs, interest and damages for delay, if for any reason the appeal is dismissed or if the judgment is affirmed, and will satisfy in full such modification of said judgment and such costs, interest, and damages, as the appellate court may adjudge and award.

In Witness Whereof Libby, McNeill & Libby, plaintiff corporation, as Principal, and Maryland Casualty Company, a corporation, as Surety,

have caused these presents to be executed this 29th day of March, 1950, in Juneau, Alaska.

LIBBY, McNEILL & LIBBY,
Principal.

By /s/ R. E. ROBERTSON,
Its Attorney and Agent.

MARYLAND CASUALTY
COMPANY,
Surety.

[Seal] By /s/ ALLEN SHATTUCK,
Its Attorney-in-Fact and
Agent.

Attest: Corporate Seal.

Executed in the presence of:

/s/ EILEEN ROBERSON,

/s/ F. O. EASTAUGH,

/s/ DORA M. SWEENEY,

/s/ SHIRLEY M. CADY.

United States of America,
Territory of Alaska—ss.

Acknowledged before me this 29th day of March, 1950, in Juneau, Alaska, by R. E. Robertson as attorney and agent of the plaintiff corporation Libby, McNeill & Libby as its free and voluntary act and deed and by Allen Shattuck as attorney-in-fact and agent on behalf of the Maryland Casualty

Company, a corporation, surety, as the latter's free and voluntary act and deed.

Witness my hand and official seal the day and year herein first written.

[Seal] /s/ FREDERICK O. EASTAUGH,
Notary Public for Alaska.

My commission expires June 10, 1950.

Approved as to form, amount, and sufficiency of surety this 31st day of March, 1950.

/s/ HENRY RODEN,
Attorney for Defendant
Peter Lathourakis.

Approved and appeal allowed this 3rd day of April, 1950, at Ketchikan, Alaska.

/s/ GEORGE W. FOLTA,
Judge of the District Court for the Territory of
Alaska, Division No. One.

[Endorsed]: Filed April 3, 1950.

STATEMENT OF POINTS

Plaintiff corporation, Libby, McNeill & Libby, appellant herein, intends to rely upon the following points on appeal.

1. Under the Workmen's Compensation Act of Alaska the Alaska Industrial Board's findings, decision and award must be based upon competent evidence, and not upon ex parte, hearsay, unverified, or other incompetent evidence, whereas the Board's decision and award and its findings herein were based upon ex parte, hearsay, unverified, or other incompetent evidence and therefore were not conclusive upon the District Court.

2. The only competent evidence adduced at the hearing before the Alaska Industrial Board proved that Lathourakis' total temporary disability ended on October 1, 1948, whereas the Board's decision and award as well as the District Court's judgment held he suffered total temporary disability until May 20, 1949.

3. The only competent evidence adduced at the hearing before the Alaska Industrial Board proved that Lathourakis was entitled to total temporary disability compensation of \$1,050.80 only which he was paid prior to his filing of his application for adjustment of claim, whereas the District Court's judgment allowed him total temporary disability compensation of \$2,005.00, which was additional to said \$1,050.80.

4. The only competent evidence adduced at the

hearing before the Alaska Industrial Board proved that Lathourakis suffered no permanent disability from an injury by accident arising out of and in the course of his employment, whereas the Board's decision and award as well as the District Court's judgment allowed him compensation of \$3,600.00 for 50% permanent disability.

5. The District Court's judgment disregarded the fact that the Alaska Industrial Board's decision and award and its findings were based solely upon *ex parte*, hearsay, unverified or other incompetent evidence, and were against the weight of the only competent evidence adduced at the hearing before the Board particularly in respect to:

(a) Finding Lathourakis suffered total temporary disability to May 20, 1949, instead of to October 1, 1948, only;

(b) Awarding Lathourakis total temporary disability compensation of \$3,833.55 (reduced by judgment to \$2,005.00), instead of only \$1,050.80 already paid;

(c) Finding Lathourakis suffered 50% permanent disability, whereas he suffered no permanent disability;

(d) Awarding Lathourakis compensation of \$3,600.00 for 50% permanent disability, whereas he was entitled to no permanent disability compensation,

which erroneous findings were not conclusive upon the District Court.

6. The Workmen's Compensation Act of Alaska does not authorize or provide for the award for the same injury to the same employee not only of temporary, either partial or total, disability compensation but also of permanent, either partial or total, disability compensation arising by accident out of and in the course of his employment, whereas the District Court's judgment as well as the Alaska Industrial Board's Decision and award allowed Lathourakis, who sustained only one injury in the same accident, total temporary disability compensation up to May 20, 1949, amounting under the judgment to \$2,005.00, and 50% permanent disability compensation of \$3,600.00.

7. The District Court was without jurisdiction to allow and assess an attorney's fee of \$350.00, or any sum, to Lathourakis for services of his attorney in the proceedings before that Court.

/s/ R. E. ROBERTSON,
Attorney for
Plaintiff-Appellant.

Copy received April 18, 1950.

/s/ HENRY RODEN,
Attorney for Defendant
Peter Lathourakis.

/s/ J. GERALD WILLIAMS,
Attorney General for Alaska and Attorney for
Alaska Industrial Board.

[Endorsed] : Filed April 18, 1950.

In the District Court for the Territory of Alaska,
Division Number One at Juneau

No. 6200-A

LIBBY, McNEILL & LIBBY, a Corporation,
Plaintiff,

vs.

ALASKA INDUSTRIAL BOARD, composed of
the Territorial Insurance Commissioner, At-
torney General for Alaska, and the Territorial
Commissioner of Labor, and PETER LA-
THOURAKIS,

Defendants.

DESIGNATION OF CONTENTS OF RECORD ON APPEAL

Plaintiff corporation Libby, McNeill & Libby, ap-
pellant herein, hereby designates the hereinafter
mentioned portions of the record, proceedings, and
evidence, to be contained in the record on appeal
and requests the Clerk of the above court, to
promptly prepare and under his hand and the seal
of the Court to transmit to the United States Court
of Appeals for the Ninth Circuit a true copy thereof
in accordance with the rules of the appellate court,
but to omit from all papers, except this Designa-
tion, the title of the court and the number and title
of the cause, namely:

1. This Designation.
2. Complaint and appeal from decision and

award of Alaska Industrial Board under the Workmen's Compensation Act of Alaska, together with the three exhibits thereunto attached, namely:

- I. Application for Adjustment of Claim.
 - II. Admission of Service and Answer to Application.
 - III. Decision and Award of Alaska Industrial Board.
3. Stipulation making Lathourakis a party defendant.
 4. Answer of defendant Lathourakis.
 5. The appellant's objections, namely: That "no evidence is admissible which is ex parte and which does not give the defendants the opportunity to cross-examine the person by whom such inadmissible evidence was adduced" and "the Board has no power or authority to award both temporary disability and permanent partial or total disability and, if any permanent partial or total disability is awarded, then no temporary disability can be awarded" made not only in its brief before the Board but also at the hearing before the Board.
 6. Defendant Lathourakis' deposition.
 7. Defendant's witness Fred Scheel's deposition.
 8. Letter of Dr. L. E. Williams of May 20, 1949.
 9. Deposition of Dr. Thorburn S. McGowan, appellant's witness.
 10. Deposition of Dr. A. Bernard Gray, appellant's witness.
 11. Stipulation of August 13, 1949.

12. Minute Order of January 18, 1950.
13. District Court's opinion.
14. Judgment of March 24, 1950.
15. Notice of Appeal.
16. Supersedeas on Appeal.
17. Statement of Points upon which appellant intends to rely, and which are filed herewith.
18. All docket entries.

/s/ R. E. ROBERTSON,
Attorney for Plaintiff-
Appellant.

Copy received April 18, 1950.

/s/ KENNY RODEN,
Attorney for Defendant,
Peter Lathourakis.

/s/ J. GERALD WILLIAMS,
Attorney General for Alaska and Attorney for
Alaska Industrial Board.

[Endorsed]: Filed April 18, 1950.

[Title of District Court and Cause.]

DESIGNATION OF CONTENTS OF
RECORD ON APPEAL

The defendant Peter Lathourakis respectfully suggests and requests that in addition to the portions set forth in plaintiff's-appellant "Designation of Contents of Record on Appeal" the following enumerated parts of the evidence submitted upon the hearing of said cause by said defendant Lathourakis, be made a part of said record on appeal, to wit: The letter of Doctor Frederick Slyfield, dated February 23, 1949, and the letter of Doctor L. E. Williams, dated March 23, 1949.

/s/ KENNY RODEN,
Of Attorneys for Defendant
Peter Lathourakis.

Copy received May 9, 1950.

/s/ R. E. ROBERTSON,
Attorney for Plaintiff,
Libby, McNeill & Libby.

[Endorsed]: Filed May 9, 1950.

CERTIFICATE

United States of America,
District of Alaska, Division No. 1—ss.

I, J. W. Leivers, Clerk of the District Court for the Territory of Alaska, First Division thereof, do hereby certify that the foregoing and hereto attached 122 pages of typewritten matter, numbered from 1 to 122, both inclusive, constitute a full, true and complete copy, and the whole thereof, of the record prepared in accordance with the Designation of Contents of Record on Appeal of Appellant on file herein and made a part hereof, in Cause #6200-A, wherein Libby, McNeill & Libby, a corporation, is Plaintiff-Appellant and Alaska Industrial Board, et al., and ePter Lathourakis are Defendants-Appellees, as the same appears of record and on file in my office; that said record is by virtue of an appeal in this cause.

And I further certify that by stipulation of the parties and with the consent of the Court the reporting of this case by the Official Reporter was waived.

I further certify that this transcript was prepared by me in my office, and that the cost of preparation, examination and certification amounting to Fifty-three Dollars and 15/100 has been paid to me by Counsel for Appellant.

In Witness Whereof, I have hereunto set my hand

and the seal of the above-entitled court this 23rd day of May, 1950.

J. W. LEIVERS,

Clerk of District Court.

By /s/ P. D. E. McIVER,

Deputy.

[Endorsed]: No. 12562. United States Court of Appeals for the Ninth Circuit. Libby, McNeill & Libby, a Corporation, Appellant, vs. Alaska Industrial Board, composed of the Territorial Insurance Commissioner, Attorney General of Alaska and the Territorial Commissioner of Labor, and Peter Lathourakis, Appellees. Transcript of Record. Appeal from the District Court for the Territory of Alaska, First Division.

Filed June 1, 1950.

/s/ PAUL P. O'BRIEN,

Clerk of the United States Court of Appeals for the Ninth Circuit.